



INTERNATIONAL COURT OF JUSTICE

CASE CONCERNING MARITIME DELIMITATION

AND TERRITORIAL QUESTIONS

BETWEEN

QATAR AND BAHRAIN

(QATAR v. BAHRAIN)

COUNTER-MEMORIAL

SUBMITTED BY

THE STATE OF BAHRAIN

(Merits)

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CONTENTS

CHAPTER 1

INTRODUCTION

SECTION 1.1	Outline of the Counter-Memorial	1
SECTION 1.2	The status and impact of the 81 forged documents	2

PART I – THE TERRITORIAL QUESTIONS

CHAPTER 2

THE FUNDAMENTAL BASES OF BAHRAIN'S SOVEREIGNTY OVER THE ZUBARAH REGION AND THE HAWAR ISLANDS

SECTION 2.1	General observations on Qatar's treatment of the territorial question.....	7
SECTION 2.2	The Zubarah Region was Bahraini until the Al-Thani attack of 1937.....	12
A.	Introduction.....	12
B.	The threefold human geography of the Qatar peninsula: the Naim-led confederation of the north; the Saudi Bedouin in the south; and the Doha confederation in the east	17
C.	The Naim tribe who occupied the Zubarah Region maintained their allegiance to the Al-Khalifa Rulers	18
D.	Qatar's description of the "ancient" history of Zubarah prior to its founding by the Al-Khalifa in 1762 is inaccurate and misleading.....	26
E.	Qatar's description of the history of the Qatar peninsula until the middle of the 19th Century prior to 1871 is inaccurate and misleading.....	30
F.	Qatar claims falsely that Britain and Bahrain acknowledged the Qatar peninsula as a territorial unit under Al-Thani control from the mid-19th Century	32

G.	The events of 1867-1868 did not amount to recognition of an independent "State of Qatar", but rather the opposite.....	36
H.	Qatar claims falsely that a political entity called "Qatar" was recognised prior to 1916 and that it included the entire Qatar peninsula	41
	(i) The Ottomans acknowledged that they never had any control outside the Doha enclave.....	41
	(ii) The Al-Thani understood that the Doha enclave was subject to the Ottoman protégé and Al-Khalifa pretender – Sheikh Nasir bin Mubarak	44
	(iii) Bahrain's claim to rights in Zubarah was recognised by Britain	46
	(iv) Britain and Bahrain did not recognise Ottoman or Al-Thani rights in Zubarah.....	48
	(v) 1896-1910: Fifteen critical years that are passed over without comment in Qatar's Memorial	52
	(vi) The negotiations over the unratified 1913 Anglo-Ottoman Convention.....	56
I.	Qatar claims falsely that the 1916 Treaty between Britain and the Chief of Doha included the entire Qatar peninsula	59
J.	Qatar's Memorial offers no post-Ottoman evidence of Al-Thani activities in Zubarah until shortly before the 1937 attack.....	67
K.	Qatar's attack on the Zubarah Region in 1937 displaced Bahrain.....	67
L.	The evidence of Bahrain's sovereignty over the Zubarah Region is not fundamentally disturbed by Qatar's arguments.....	68
SECTION 2.3	The Continuity of Bahrain's sovereignty over the Hawar Islands from the 18th Century to the present day	69
A.	Introduction.....	69
B.	Qatar's claim that the Hawar Islands are geographically proximate to the Qatar peninsula is correct but irrelevant.....	72
C.	Qatar has not produced any authentic evidence of exercise of authority in the Hawar Islands.....	73

D.	Qatar claims falsely that the Ottoman Empire, Britain, Bahrain and neighbouring States recognised the Hawar Islands as part of the territories controlled by the Doha confederation or Qatar	74
E.	Qatar claims falsely that the Hawar Islands were never populated and could not support habitation.....	81
F.	Qatar claims falsely that the Dowasir tribe, the principal occupants of the Hawar Islands, were not subject to the authority of Bahrain.....	84
G.	Qatar's version of the history of oil concession negotiations is a fabrication.....	89
	(i) The 1925 Bahrain oil concession.....	89
	(ii) Negotiations for the Bahrain Unallotted Area concession: 1928-1933	93
	(iii) The 1935 Qatar oil concession.....	101
	(iv) The so-called 1936 British "Provisional Decision"	104
	(v) The British decision regarding sovereignty over the Hawar Islands	113
H.	Prior's and Alban's criticisms of the 1939 Award were hasty, unfounded, and disproved	123
I.	Janan Island is part of the Hawar Islands group and was awarded to Bahrain by the 1939 British Award	130
	(i) Britain did not "decide" in 1947 to award Janan Island to Qatar.....	132
	(ii) The British Political Agent's choice of the 1938 list was mistaken.....	134
	(iii) The British Political Agent relied on unverified survey information	138
	(iv) The British Political Agent was influenced by extraneous considerations	139
	(v) The British Political Agent failed to take into account directly relevant evidence	141
	(vi) Bahrain's sovereignty over Janan Island was recognised by Britain in 1936 and confirmed in 1939.....	143

(vii)	Independently of the 1939 British Award, Bahrain's sovereignty over Janan Island in the Hawar Islands is well-established.....	150
J.	The evidence of Bahrain's sovereignty over the Hawar Islands is not undermined by Qatar's arguments	151

CHAPTER 3

BAHRAIN'S TITLE TO THE HAWAR ISLANDS IS RES JUDICATA

SECTION 3.1	Introduction.....	154
SECTION 3.2	The procedures for the 1939 arbitration were straightforward and fair	155
SECTION 3.3	Qatar's allegations of British wrongdoing cannot be considered by the Court in the absence of Great Britain as a Party	162
A.	Qatar has alleged unlawful acts by Britain	162
B.	Qatar's allegations necessarily implicate the British Government and not only Weightman and Belgrave.....	162
C.	Qatar's allegations are inadmissible in the absence of Britain as a Party.....	165
SECTION 3.4	The burden of proof with respect to the validity of the 1939 Award rests on Qatar	167
SECTION 3.5	Refutation of Qatar's criticisms of the 1939 Award	168
A.	Qatar's allegation of absence of consent is unfounded	168
(i)	Explicit Consent.....	168
(ii)	Implied Consent: Participation without Protest.....	170
B.	There was no British bias.....	171
C.	There was no violation of <i>audi alteram partem</i>	178
D.	Britain violated no obligation in its assignment of the burden of proof	181
E.	There were no procedural improprieties with regard to hearings or witnesses	182
(i)	Oral hearing	182

	(ii) Cross-examination of witnesses.....	183
F.	Reasons	184
SECTION 3.6	The 1939 Award is confirmation of a settled state of affairs	186
SECTION 3.7	The special status of decisions establishing boundaries	187
SECTION 3.8	Qatar claims falsely to have maintained its challenge to the British Award since 1939	188

CHAPTER 4

BAHRAIN'S RIGHT TO SOVEREIGNTY OVER THE ZUBARAH REGION

REMAINS INTACT

SECTION 4.1	In accordance with a legal principle explicitly acknowledged by Qatar itself, Bahrain's sovereignty over Zubarah was not lost in 1937.....	192
SECTION 4.2	Bahrain has never acquiesced in Qatar's conquest of Zubarah, nor has Qatar's claim to sovereignty ever been acknowledged by a binding decision	192

PART II – THE MARITIME DELIMITATION

CHAPTER 5

THE POINTS OF AGREEMENT AND DISAGREEMENT

SECTION 5.1	The nature of the delimitation to be carried out: a single maritime boundary.....	197
SECTION 5.2	The division into two sectors.....	199
SECTION 5.3	The geographical relationship between the coasts.....	199
SECTION 5.4	The delimitation is to be effected according to the contemporary law of maritime delimitation	200
SECTION 5.5	The impact of the supervening factor created by the extension of the Parties' respective territorial seas to 12 nautical miles	202
SECTION 5.6	The British line of 1947 is not the maritime boundary.....	203

SECTION 5.7	The two major points of disagreement	203
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CHAPTER 6

QATAR'S CLAIM RESTS ON THE FICTION OF A GEOGRAPHICAL AND LEGAL VACUUM BETWEEN THE COAST OF BAHRAIN'S MAIN ISLAND AND THE QATARI PENINSULA, DISREGARDING THE INSULAR AND ARCHIPELAGIC NATURE OF BAHRAIN

SECTION 6.1	The erroneous theory of so-called "main coasts"	212
A.	There is no hierarchy between the coasts	212
B.	Bahrain is a sea-oriented archipelagic State	214
SECTION 6.2	Qatar's equivocal reference to "features which do not generate their own maritime zone"	220
A.	Bahrain's islands	220
B.	Bahrain's low-tide elevations	225
C.	The law governing sovereignty over low-tide elevations is the law governing territorial sovereignty	227
D.	Bahrain's sovereignty over all the features lying between the eastern coast of Bahrain's main island and the western coast of the peninsula of Qatar	233
SECTION 6.3	Qatar's misconceived recourse to the theory of "unusual features"	234

CHAPTER 7

QATAR'S CLAIM GIVES UNDUE WEIGHT TO THE BRITISH LINE OF 1947

SECTION 7.1	Qatar's position	240
SECTION 7.2	Qatar's position is self-contradictory	242
SECTION 7.3	The British 1947 line is irrelevant to the delimitation which the Court is requested to effect	244
A.	The letters of 23 December 1947, unlike Britain's arbitral award of 1939 in relation to the Hawar Islands, did not	

	constitute a "decision" purporting to bind Bahrain and Qatar, nor was it regarded by the Parties as such	244
B.	The 1947 letters did not purport to be legal decisions, and the 1947 line was not based exclusively – or even mainly – on legal criteria	249
C.	The 1947 letters related exclusively to the delimitation of the continental shelf, and expressly did not purport to delimit the superjacent waters.....	252
D.	The concepts and rules by reference to which the 1947 line was drawn do not correspond to the contemporary international legal concepts and rules under which the Parties have called upon the Court to delimit a single maritime boundary between the two States	255
E.	The 1947 line does not rest on any known or identifiable legal ground	259
F.	The 1947 line has no relevance in the light of the supervening factor created by the extension of the territorial sea of both countries from 3 to 12 miles.....	261
G.	The 1947 line has no relevance as a source of "historic title"	263
SECTION 7.4	Conclusion	263

CHAPTER 8

THE SINGLE MARITIME BOUNDARY REQUESTED BY QATAR IS NOT IN ACCORDANCE WITH THE PRINCIPLES AND RULES OF INTERNATIONAL LAW

SECTION 8.1	The two sectors	265
A.	The Parties agree that there are two sectors.....	265
B.	The reasons and methodological implications of distinguishing two sectors.....	265
C.	The location of the line dividing the two sectors.....	267
D.	Qatar's justification for its proposed dividing line.....	267
E.	The consequences of Qatar's contradiction.....	268

SECTION 8.2	The southern sector	269
A.	The segment of the boundary requested by Qatar to the south of point L	269
B.	The segment of the boundary requested by Qatar from point L to the intersection with the so-called "closing line" ...	272
SECTION 8.3	The northern sector	274
A.	The coastal relationship in the northern sector	274
B.	The legally relevant circumstances in the northern sector	275
C.	The segment of the single maritime boundary requested by Qatar to the south of point BLV, <i>i.e.</i> , from the so-called closing line northwards to point BLV	282
D.	The segment of the single maritime boundary requested by Qatar to the north of point BLV	283
(i)	The delimitation method proposed by Qatar	283
(ii)	The perpendicularity method	285
(iii)	The perpendicular to the general direction of the coast	289
(iv)	The perpendicular to the closing line of a coastal concavity ..	290
(v)	In the present case there is no coastal concavity	292
(vi)	... and, therefore, no "closing line"	293
(vii)	The single maritime boundary requested by Qatar to the north of point BLV is a perpendicular only in name	294
E.	The proportionality test in Qatar's Memorial	296
SECTION 8.4	The single maritime boundary requested by Qatar is not in accordance with the fundamentals of the law of maritime delimitation	298
A.	The single maritime boundary requested by Qatar disregards the very concept of maritime delimitation	298
B.	The single maritime boundary requested by Qatar disregards the principles and rules governing the delimitation process	299

- C. The single maritime boundary requested by Qatar disregards the fundamental principle that an equitable solution is "the aim of any delimitation process" 301

CHAPTER 1

INTRODUCTION

This Counter-Memorial of the Government of the State of Bahrain (hereinafter "*Bahrain*") is filed pursuant to the Order of the Court of 30 October 1996. Its primary objective is to demonstrate that Qatar's Memorial fails to disturb the legal and factual foundations of Bahrain's claims, which are hereby reiterated.

SECTION 1.1 Outline of the Counter-Memorial

1. Section 1.2 of this introductory Chapter recalls Bahrain's position with respect to the serious complications caused by Qatar's submission of 81 forged documents. These forgeries constitute a massive and intolerable abuse of the processes of the Court. It is imperative that such documents not be allowed to distort consideration of the merits of the dispute.

2. Part One deals with the territorial claims. Chapter 2 demonstrates that, wholly apart from the 1939 Award by Britain, which acknowledged Bahrain's sovereignty over the Hawar Islands, the fundamental bases of Bahrain's sovereignty over the Hawar Islands and the Zubarah Region are firmly established by reliable proof. Bahrain invokes the most cogent evidence of State activity, as well as continuous and peaceful display of territorial sovereignty, over a period of two centuries. With respect to the Hawar Islands, this continuum has never been interrupted. As for Zubarah, the continuum was disrupted by an armed invasion by Qatar in 1937, an illegal act which cannot generate any legal effect under international law. Chapter 3 then reaffirms that Bahrain's sovereignty over the Hawar Islands is *res judicata*. Section 3.3 raises the specific objection (which Bahrain could not have raised before reading Qatar's Memorial) that Qatar's allegations of British wrongdoing in connection with the 1939

Award are inadmissible in the absence of Britain as a party. Chapter 4 demonstrates that Bahrain's rights to restoration of its rights over the Zubarah Region remain intact.

3. Part Two deals with the maritime delimitation. Bahrain reiterates the claim articulated in its Memorial. Following a review in Chapter 5 of the points of agreement and disagreement between Bahrain and Qatar over the maritime delimitation, Chapter 6 demonstrates the fundamental inadequacies of Qatar's maritime delimitation claim in international law. Chapter 6 shows that Qatar's claim rests on the fiction of a geographical and legal vacuum between the coast of Bahrain's main island and the Qatar peninsula; it disregards the multi-insular and archipelagic nature of the State of Bahrain, in particular the presence of Bahraini islands and other Bahraini maritime features in the relevant area. Chapter 7 explains how Qatar's claim gives undue weight to the British line of 1947, which, as Qatar itself acknowledges, is not legally binding, and which is irrelevant to the single maritime boundary which the Court is now requested to identify. Finally, Chapter 8 demonstrates that the single maritime boundary requested by Qatar is in fundamental conflict with the principles and rules of international law.¹

SECTION 1.2 The status and impact of the 81 forged documents

4. As the Court will recall, Qatar's Memorial introduced 81 new documents containing startling revelations which, if true, would mean that previously accepted history must be radically rewritten – not only the history of Bahrain and Qatar, but also that of the Gulf as a whole. Qatar's Memorial does not explain why Qatar failed to mention these documents in 1938-39 when Britain arbitrated a dispute over the Hawar Islands in Bahrain's favour. Nor does it explain when and how the original texts of

¹ In this Counter-Memorial, Bahrain has, with few exceptions, only included as annexes documents that were not already submitted as annexes to either Bahrain's or Qatar's Memorials. Where a document was cited by both Bahrain and Qatar in their respective Memorials, Bahrain has provided the Bahrain Memorial Annex reference ("BM Annex"), as well as the Qatar Memorial Annex cross-reference ("QM Annex").

these documents, most of which were written by persons outside Qatar to other persons outside Qatar – and which were quite unknown to Bahrain and its specialist advisers – succeeded in reaching only the Diwan Amiri Archives of Qatar but did not reach any other and more likely repositories.

5. Bahrain has established that the 81 documents are forged. Even when confronted with the results of Bahrain's painstaking verification efforts, as detailed in Bahrain's letter to the President of the Court dated 25 September 1997, Qatar has provided no explanation. The same restraint marked the statements made by its representatives at the meeting which the President of the Court held with the Parties on 25 November 1997. All Qatar has said, in its letter to the Court dated 6 October 1997, was that:

"before submitting these documents to the Court as Annexes to its Memorial, Qatar satisfied itself that there was no reason to doubt their authenticity."

6. As already explained in its letter of 25 September 1997, Bahrain will treat the content of the 81 forged documents as non-existent. Bahrain's letter of 25 September 1997 should be read together with and treated as part of the present Counter-Memorial.

7. The significance of the forgeries may, however, be briefly recalled as follows.

8. In July 1986, in the context of extensive diplomatic efforts in the aftermath of Qatar's armed attack and abduction of 29 workers from Fasht ad Dibal on 26 April of that year,² Qatar submitted to the Council of Ministers of the Gulf Co-Operation Council a lengthy memorandum in Arabic which set out its contentions regarding the border dispute between Qatar and Bahrain.

² See Bahrain's Memorial (hereafter referred to as "BM") paras. 488, 592 and 623.

9. Section One of this memorandum was entitled "Summary of the Evidence on Qatari Sovereignty over the Hawar Islands." It was presented in four parts:

- "geographical evidence" (in which Qatar mentioned the uncontested but legally irrelevant fact that the Hawar Islands are close to the Qatar peninsula);
- "historical evidence" (in which Qatar stated that it had become an autonomous State in 1868 (*sic*) and argued, albeit in a circular fashion, that as a result of Qatar's independence "the Hawar Islands, being part of Qatar, were included");
- "legal evidence" (in which Qatar argued that the Hawar Islands must be part of Qatar because they were within Qatar's territorial sea); and
- "logical evidence" (in which Qatar argued that the Hawar Islands must "inevitably" belong to Qatar because Qatar was in a better position than Bahrain to ensure the military and ecological protection of the Islands).

10. The memorandum contained some 217 pages of annexes of historical documents and narratives going back to 1766. Not one of the 81 documents presented in Qatar's Memorial of 30 September 1996, wherein they are alleged to be part of Qatar's own archives, is to be found among these numerous annexes to the 1986 memorandum.

11. Qatar's 1986 memorandum and its annexes contained none of the allegations now presented, on the basis of the 81 forged documents, of a historic British-Bahraini conspiracy to fabricate evidence favourable to Bahrain, to destroy evidence favourable to Qatar, and to produce an Award tainted by bias in favour of Bahrain. The 1986 memorandum and its annexes contained no allegations – nor, of course, any proof – of Qatari historic acts of sovereignty or acts of administration in the Hawar Islands and the Zubarah Region. There were no allegations – nor any proof – of a 19th Century Anglo-Ottoman Agreement on the boundary between Qatar and Bahrain; and even less so of any specific understanding that the Hawar Islands were a part of Qatar. Nor did the 1986 materials contain any allegations – let alone proof – that 19th Century rulers in the

Gulf had spontaneously felt the need to write letters proclaiming their belief that the Hawar Islands (which never appeared at issue until shortly after oil was discovered in Bahrain in 1932) belonged to Qatar, which did not exist as a State when these "letters" were allegedly written.

12. All of these new allegations were to come for the first time with the 81 new documents presented in Qatar's Memorial of 30 September 1996.

13. The arguments which Qatar had put forward in its 1986 memorandum caused Bahrain no concern. Qatar's primary position was plainly contradicted by the principle that proximity does not create international title, a basic principle in international law which has consistently been upheld.³ Qatar's arguments added nothing to those that had failed in the 1938-39 arbitration in which Britain, as arbitrator, confirmed Bahrain's title to the Hawar Islands. Whatever might have been the results of regional mediation efforts as a political matter, therefore, Bahrain did not expect that Qatar would again seriously pursue its claim in a legal forum.

14. Bahrain was surprised when Qatar sought unilaterally to bring its claims before the International Court of Justice. In Bahrain's perception, Qatar was pursuing a course in which it thought it had something to gain but nothing to lose, with little heed for ordinary prudence. At the same time, Bahrain was seriously troubled by the fact that so substantial a portion of its overpopulated territory was being put at risk.⁴

15. Today, Qatar has abandoned the regional dispute resolution and come to the Court seeking to turn the tables of law and history by using dramatic new "evidence." If

³ See BM Section 4.3.

⁴ As stated in BM para. 54, Bahrain is among the world's five most densely populated countries. Moreover, according to World Bank statistics Bahrain's population in the 1975-1994 period rose by 106%, a much higher rate than that of, for example, the Philippines (52%) or India (46%). The area of Bahrain's territory (701 km²) is about the same as that of Singapore (639 km²) and well less than one-third of that of Luxembourg (2,586 km²). Qatar has 16 times Bahrain's land area but less than half its population.

Qatar's "evidence" had been available in 1986, it could and should have been included in Qatar's memorandum to the GCC. Each of the 81 documents antedates 1986 – indeed 52 of them antedate the 1938-1939 British arbitration. Considering the great weight given to them in Qatar's Memorial before the Court, one can only surmise that:

- either Qatar had not procured or fabricated the 81 documents by 1986
- or Qatar was reluctant to show them to the member States of the Gulf Co-Operation Council since they included documents which, in all likelihood, would have been quickly recognised as forgeries in Saudi Arabia⁵ and Abu Dhabi.⁶

16. Qatar now apparently persists in relying on these forged documents to support its attempt to appropriate a substantial portion of Bahrain's territory. The Court will appreciate that the matter cannot be treated as a routine controversy as to the reliability of isolated items of evidence; the gravity of the violation, in terms of the seriousness of the breach of principle and in the scope of its intended effect, is too far-reaching.

17. Moreover, Bahrain invites the Court to draw the appropriate inferences as to the fragility of the claims of a Party which is so hard-pressed to produce genuine evidence that it finds itself reduced to relying so extensively on blatant forgeries.

⁵ See Statement of Mr Adil AlGosaibi dated 22 April 1997, Appendix II.13 to Bahrain's letter of 25 September 1997 to the President of the Court.

⁶ See Research Report from the Centre for Documentation and Research, the Cultural Centre of Abu Dhabi, dated 25 April 1997, Appendix II.3 to Bahrain's letter, *ibid.*

PART I – THE TERRITORIAL QUESTIONS

CHAPTER 2

THE FUNDAMENTAL BASES OF BAHRAIN'S SOVEREIGNTY OVER THE ZUBARAH REGION AND THE HAWAR ISLANDS

SECTION 2.1 General observations on Qatar's treatment of the territorial question

18. Qatar's discussion of the territorial questions suffers from three fundamental defects which appear consistently throughout its Memorial of 30 September 1996: anachronism, revisionism, and nominalism.

19. All three defects appear in Qatar's claim that it became a sovereign State in the 1860s.⁷ In fact, the situation in the Qatar peninsula until well into the 20th Century contradicts any meaningful notion of statehood extending over the entire Qatar peninsula. One need only consider, by way of illustration, the following elements of the historical record:

- The Rulers of Bahrain received tribute and taxes from all inhabitants of the Qatar peninsula until tribal chiefs in the Doha region rebelled in 1866. This rebellion was put down and in 1868 Mohammed bin Thani as Chief of the Maadhid tribe agreed to collect that tribute and taxes from other local chiefs so that payments to the Ruler of Bahrain would be resumed.⁸

⁷ See Qatar's Memorial (hereafter referred to as "QM") Chapter III, Section 3 and Chapter V.

⁸ BM para. 127.

- An internal Ottoman Empire report in 1871 referred to Mohammed bin Thani as residing in Doha and having "no rule over the other villages."⁹
- In 1881, Mohammed's son Jasim wrote to the British Political Resident that:

"I have no power over [the Katar coast]. You are aware of the treaty made in the time of my father [1868] between us and the British Govt. namely that we were only to be responsible for [Doha Town] and Al Wakra [a village just south of Doha]."¹⁰
- In 1893, in a meeting with the British Political Resident:

"Shaikh Jasim at once acknowledged the rights of Bahrain and expressed his willingness to pay tribute as before."¹¹
- Throughout the period of their presence in Arabia (1871-1915), the Ottomans referred to the "Qatar province" as being the region of Doha, as opposed to the Zubarah and Odaid territories elsewhere on the peninsula.¹²
- Between 1874 and 1903 six attempts by the Ottomans and the Al-Thani to exercise authority over Zubarah from Doha were repulsed by Bahrain and Britain.¹³
- In 1907, the Ottoman Governor of Sanjak reported that "where the Ottoman coast ends ... the seaport town of Qatar is under the independent control of a Sheikh called Jasim Al Thani."¹⁴

⁹ BM paras. 133 and 158.

¹⁰ BM para. 133.

¹¹ BM para. 164.

¹² BM Section 2.6.

¹³ BM Section 2.7.

¹⁴ BM Ann. 72(a), Vol. 3.

- The Ottomans repeatedly acknowledged – at the highest level – that they had never exercised any effective control over the Qatar peninsula, apart from Doha and its immediate environs.¹⁵
- Although a Treaty was finally signed between Britain and the "Ruler of Qatar" in 1916, that Treaty did not define the territorial limits of Qatar. Indeed, a close analysis of the Treaty and a review of subsequent history leads to the conclusion that the denomination "Qatar" referred only to Doha and its environs.¹⁶
- In 1932, the Ruler of Qatar admitted in public that certain areas of the Qatar peninsula appertained to Bahrain.¹⁷
- In 1947, the British Political Resident noted that the Ruler of Qatar was a "late arrival" on the political scene of the region and had only consolidated his position on the Qatar peninsula in 1937.¹⁸

20. Qatar presents the "State of Qatar" as possessed of full-fledged statehood commencing in 1868.¹⁹ Yet the Al-Thani chief of Doha in 1881 acknowledged, as seen above, that he had no responsibility for the conduct of tribes outside the Doha region. This element of contradiction reflects the anachronism of Qatar's claim.

21. Qatar's discussion elevates Mohammed bin Thani and Jasim Al-Thani, who were not even demonstrably in command of the various tribes in the region of Doha, to the

¹⁵ BM Section 2.2.H.(i).

¹⁶ BM paras. 217-222.

¹⁷ Section 2.2.I.

¹⁸ Sections 2.2.A and 2.2.I.

¹⁹ QM para. 3.38.

status of Heads of a State purportedly encompassing the entirety of the peninsula.²⁰ Herein lies the revisionism underlying Qatar's claim.

22. Qatar unceasingly treats the word "Qatar" whenever it appears in any document as referring to the entirety of the peninsula as a political entity without regard to the context in which the word was used.²¹ Even a cursory consideration of the circumstances of many of the documents relied on by Qatar shows that it was quite obviously impossible that their authors should have intended to refer to any place beyond the vicinity of Doha or, possibly, beyond a province encompassing a limited stretch of the east coast of Qatar, or yet again beyond the territory actually under Al-Thani control – whatever its extent might have been.²² This reliance on the mere use of a word, defined as Qatar wishes to define it, to answer the very question being posed is empty nominalism and of no assistance in resolving any controversy.

23. With respect to the Hawar Islands, Qatar's approach is once again nominalistic. Its Memorial argues that the Hawar Islands belonged to "Qatar" well before 1939 because of their close proximity to the peninsula.²³ The absence of legal persuasiveness of this argument has been demonstrated in Section 4.3 of Bahrain's Memorial. But even if proximity were a valid basis for title, it is pointless for Qatar to argue that the Hawar Islands were attached to "Qatar" at a time when the territorial scope of the recently created political entity of "Qatar" simply did not reach the west coast of the Qatar peninsula nearest the Hawar Islands.

24. Qatar's several variations on the theme of proximity thus contribute nothing to its case. The Hawar Islands are obviously close to the Qatar peninsula, but the fact that

²⁰ QM paras. 3.22 and 3.38, and Chapter V.

²¹ For example, see QM para. 6.27.

²² For example, see QM paras. 3.36-3.38.

²³ For example, see QM para. 4.2.

many people have recorded this geographical truth is irrelevant to the issue of sovereignty. Thus, to take but one example, it borders on the absurd for Qatar to invoke the fact that the Royal Air Force in 1934 concluded that, in the event of inclement weather over western Qatar, the Hawar Islands could provide a refuge for flying boats. And yet, paragraph 6.27 of Qatar's Memorial advances the astonishing conclusion that: "The RAF was thus in no doubt at this time that Hawar island belonged to Qatar." This yields no more support for a Qatari claim of sovereignty than an observation that vessels setting out from Normandy might find leeward refuge off Jersey would support a French claim of sovereignty over the Channel Islands. (In fact, the RAF report could be taken as evidence that the Hawar Islands' climate and ecology were distinct from the peninsula.)

25. In connection with the Hawar Islands, however, the most egregious defect of Qatar's presentation is its attempt to rewrite history on a grand scale. Qatar does so through the use of forged documents and, to a significant extent, by the misleading misquotation and misuse of authentic documents.

26. It will be recalled that at the time of presenting his claim during the 1938-1939 British arbitration, the Ruler of Qatar was unable to produce any proof, or even allege any particulars, of his rule in the Hawar Islands. The British officials who evaluated his claim immediately saw, despite their repeated urging that he produce some evidence, that his claim had no other basis than the unsustainable one of proximity. The 1939 Award confirmed that Bahrain's sovereignty over the Hawar Islands was already a settled state of affairs at that time.

27. Coming before this Court, more than 50 years later, Qatar was obviously cognisant of the weakness of its situation given the overwhelming failure of its claim to the Hawar Islands when raised for its arbitration before the British Government in 1939, and the continuing dearth of evidence for its position. Qatar, it seems, therefore has regrettably come to the conclusion that it has no choice but to present a radical and

irresponsible new version of the story of that arbitration. Worse, the evidentiary foundation for this revisionist account consists of forged documents.

28. The remainder of the present Chapter will review the undisputed evidence relating to the territorial questions, leaving aside Qatar's forged documents, and will show that Qatar's Memorial does not begin to counter the preponderant weight of Bahrain's evidence. Bahrain regrets that the limitation of space available in the Memorial and in this Counter-Memorial does not permit it to present to the Court more than a condensed account of the history of Bahrain and the region. Unlike Qatar, Bahrain has no need to try to alter history. The historical record is clear, consistent and abundant in its support of the arguments that Bahrain has submitted to the Court in its Memorial and in this Counter-Memorial.

SECTION 2.2 The Zubarah Region was Bahraini until the Al-Thani attack of 1937

A. Introduction

29. Qatar's Memorial claims that the entire Qatar peninsula, and in particular the Zubarah Region, was under the control of the Ottomans and the Al-Thani well before the end of the 19th Century.²⁴ This is not true, as was acknowledged by the Ottomans and the Al-Thani at the time.

30. In Chapter 2 of its Memorial, Bahrain described the failure of the Al-Thani and the Ottoman Empire to exercise any control in the Qatar peninsula outside the enclave of Doha and its hinterland on the east coast and, specifically, how they failed to establish their authority in the Zubarah Region. Section 2.7 of Bahrain's Memorial recounts that the Ottomans and the Al-Thani were rebuffed by Bahrain and Britain in

²⁴ QM Chapter III Section 3 and 4 and Chapter VIII Section 2.

their attempts to exercise authority over the Zubarah Region no less than six times up to 1903. Both the Ottoman Empire and Britain, as well as Bahrain and the Al-Thani, took note of these failures (see Section 2.2.H below). In fact, as late as January 1947, in a despatch to the Secretary of State for India, the British Political Resident highlighted the historically limited political stature of the Ruler of Qatar:

"In fact, as the Political Agent points out, the Shaikh of Qatar is a late arrival on the scene. He only consolidated his position on the mainland as recently as 1937"²⁵

31. Qatar's desire to modify the human geography and history of the Qatar peninsula is understandable.²⁶ As a political entity, "Qatar" emerged only in the 20th Century when a confederation of merchants living in or near Doha, led by the Al-Thani family, slowly expanded and solidified its influence. But even then, the "Doha confederation," as such, had had only a very short prior history. In this respect, the historical background section of Qatar's Memorial (QM Chapter III) is entirely inadequate and indeed misleading. In particular, Qatar ignores the historical evidence of the existence and activities of local powers in the Gulf – undoubtedly because that historical evidence

²⁵ Letter from British Political Resident to Secretary of State for India, 18 January 1947. BM Ann. 344, Vol. 6, pp. 1478-1485; QM Ann. III.250, Vol. 8, pp. 233-242. The reference to 1937 is to the Al-Thani attack on Zubarah and the Naim tribe, which is recounted in Bahrain's Memorial in Section 2.13.

²⁶ Qatar's desire to mischaracterise its history does not appear to be limited to the present case. Dr. J.B. Kelly, an expert on whom Qatar itself relies at paragraph 5.20 of its Memorial with respect to the region's history, has observed: "... the Qataris have of late been equipping themselves with a history and an indigenous culture, both of noble proportions. The showpiece of this particular enterprise is a 'national museum', housed in the former (c. 1920) palace of the ruler in Dauhah [Doha]. Largely an inspiration of a public relations firm in London, the museum has been equipped and adorned at a cost of several millions, despite – or perhaps because of – the fundamental limitation of having very little to put into it ... [T]he museum has had to attach profound significance to fishing nets, Bedouin tents, camel halters and saddles in its re-creation of the Qatari past. It is not the fault of the Qataris that they have no history, nor can it be held against them that they would like to invent one ... What is objectionable about these public relations exercises on behalf of the Qatari regime is that they involve the falsification of the historical record over the past two centuries, notably concerning the nature and length of Bahrain's connection with Qatar, the relationship between the Al-Thani and the Ottoman Turks ..." J.B. Kelly, Arabia, the Gulf and the West, (1980) at p. 191. (Emphasis added.) Ann. 117, Vol. 2, pp. 367-370.

confirms that Bahrain was such a power and that "Qatar" as a political entity did not even exist.

32. Traditionally, Bahrain, along with Basra (in modern Iraq) and Oman, constituted the geopolitical entities that formed the Arab littoral of the Gulf. The Qatar peninsula, along with the Hasa²⁷ oases, was included within the major geographical and socio-economic unit known to historians as Greater Bahrain. The origins of Greater Bahrain go back over four thousand years to the Dilmun Empire. As well as being a focal point for land and maritime trade networks well before either Islam or Christianity, the peculiar hydrological conditions – the fresh water aquifers of Bahrain – endowed it with considerable agricultural resources. Its seas contained the main pearling banks of the Gulf. Rich in resources and population, and a natural defensive site, the Bahrain Islands thus formed a core area within this wider region of Greater Bahrain, with an extensive network of commercial and tribal relations linking it to its maritime foreland and mainland hinterland. The Bahrain Islands were a focal point for seasonal migrations linking the traditional occupations of agriculture, pastoral nomadism, pearling and fishing whilst also serving as a market and a trading and financial centre maintaining a network of relations with Mesopotamia, the Ottoman and Persian Empires, India, Oman and East Africa.

33. The Qatar peninsula, on the other hand, was an arid and practically empty desert area. Until the middle of the 19th Century, when the pearl banks off Abu Dhabi came into prominence, the north-western coast was the only area of the slightest importance on the peninsula. In the first half of the 19th Century, it was recorded that Bahrain (including the Qatar peninsula) had a population of some 70,000 inhabitants.²⁸ Of those 70,000 Bahraini subjects, only 3,500 inhabited the Qatar peninsula. Approximately

²⁷ "Hasa" refers to the eastern coast of the Arabian peninsula.

²⁸ Captain G. Brucks "Memoir Descriptive of the Navigation of the Gulf of Persia, 1821-29", hereinafter Brucks, pp. 557-566, BM Ann. 7, Vol. 2, pp. 95-104.

3,000 of the latter lived in several villages in the north-west of the Qatar peninsula, including the Zubarah Region. This compared to a mere 400 inhabitants in Bidda (now called "Doha" and referred to as such hereafter), which at the time was the only recorded settlement on the east coast of the peninsula.²⁹

34. Doha did not attain significance until the mid-19th Century, when its merchants became involved with the pearling industry that had begun to exploit new banks in the seas between Doha and Dubai.³⁰ Thus, when it began to develop, Doha and its hinterland were entirely focused on the sea to the east.

35. Qatar's Memorial depicts the Al-Thani as asserting authority over the tribes of the Qatar peninsula and even as being chiefs of the people of the Qatar peninsula.³¹ The historical record shows otherwise. The population around Doha from the mid-19th Century onward is properly described as a confederation of pearl merchants and others associated with the pearling industry. The Doha confederation was not based on any traditional system of tribal allegiances and the Al-Thani were not tribal leaders. This is confirmed by the historical record. An Ottoman report on Qatar from 1893 described the three principal tribes in the Qatar peninsula: the Beni Hajir; the al-Munasir; and the Naim. Of these, the Naim were described as being Bahraini and the Al-Thani were described as having won over "only one" of the subdivisions of the Beni Hajir tribe and part of the al-Munasir tribe.³²

36. The Al-Thani were not even the traditional leaders in Doha. Until 1843, the Chief of Doha was a headman of the Sudan tribe.³³ The situation in Doha only changed

²⁹ *Ibid.*

³⁰ In fact, the name "Bidda" denotes "something new" – in this context a new settlement.

³¹ For example, see QM para. 3.22.

³² Ottoman Report on Qatar 22 September 1893, at p. 8. Ann. 25, Vol. 2, pp. 69-86 at p. 76.

³³ J.G. Lorimer, *Gazetteer of the Persian Gulf, Oman and Central Arabia, Volume 1* (1915), (hereinafter, Lorimer), p. 799. BM Ann. 83, Vol. 3, p. 452; QM Ann. II.4, Vol. 3, p. 143.

when, following a period of internal Al-Khalifa dynastic struggles that spanned the islands of Bahrain and the Qatar peninsula, Muhammed bin Khalifa defeated a challenger at the battle of Umm Suwayya, near Doha, on 9 October 1848. He achieved his victory with the assistance of the Naim tribe, the traditional allies of the Al-Khalifa about which more will be said below (see Sections 2.2.B and 2.2.C below).³⁴ The challenger had made his base in Doha. Thus, the town was overrun by the victors and the Al-Khalifa removed the existing local chiefs there. That enabled Muhammad bin Thani – one of the principal pearl merchants who operated from Doha – to move from obscurity to become the focus of the emerging pearl-merchant community.

37. The Al-Thani, however, did not succeed thereafter in building up stable tribal allegiances and were thus unable to consolidate any political power. They were always dependent on outsiders in order to have any political role: first on the Al-Khalifa, then on the Ottomans, and finally on Britain and the Ibn Saud dynasty. This situation lasted until well after Britain agreed in 1935 to protect the Al-Thani rulers from land-based attack.

38. The new pearling banks between the Qatar peninsula and Abu Dhabi allowed the small Doha community – a few hundred persons in 1829³⁵ – to grow. That, and the historical accident of a power vacuum in Doha, enabled the Al-Thani to achieve local prominence. These developments, however, provide no support for Qatar's attempt to manufacture a history featuring the Al-Thani as masters of a unified Qatar peninsula by the mid-19th Century.

³⁴ Al-Nabhani, al-Tuhfa al-Nabhaniya fi Ta'rikh al-Jazira al-'Arabiya Cairo 1923 (section entitled "The Battle of Umm Suwayya"). Ann. 52, Vol. 2, p. 169. This event cemented the loyalty of the Naim-led confederation of tribes in the north of the Qatar peninsula to the Al-Khalifa dynasty. They remained loyal to the Al-Khalifa throughout the following decades. Indeed, this was essentially the tribal configuration which was attacked and ejected from the Zubarah Region by the Al-Thani in 1937. A. Montigny-Kozłowska, Evolution d'un groupe bédouin dans un pays producteur de pétrole: les Al Naim de Qatar, (1985 Ph.D. thesis), at pp. 66-67 and 136-137. Ann. 119, Vol. 2, pp. 378-382. See further Section 2.2.C below.

³⁵ Brucks, *op. cit.*, BM Ann. 7, Vol. 2, p. 97.

B. The threefold human geography of the Qatar peninsula: the Naim-led confederation of the north; the Saudi Bedouin in the south; and the Doha confederation in the east

39. Qatar seeks to revise history to show that from the mid-18th Century there existed one "people of Qatar"³⁶, spread over the entire peninsula, and that all its tribes were under the leadership of the Al-Thani.³⁷ To a significant extent, this claim is based on forged documents. This can only be because the reality was completely different.

40. Bahrain's Memorial has described the traditional control of the Al-Khalifa over the inhabitants and territory of the Qatar peninsula from the time they founded Zubarah.³⁸ Bahrain's control of the peninsula was to an extent accomplished through the tribes that inhabited the northwest of the Qatar peninsula, in particular the Naim tribe and its tribal confederacy.³⁹ By the mid-19th Century, the Wahhabis of central Arabia had occasionally attempted to challenge Bahrain's authority over Doha and the southern part of the peninsula.⁴⁰ The Wahhabis' power came from the tribes loyal to the Al Saud dynasty that occasionally grazed their flocks in the south of the peninsula. From the middle of the 19th Century, with the opening of the Abu Dhabi pearl banks to the east of the Qatar peninsula, the pearl-merchant enclave in Doha began to gain some importance as a commercial centre. Thus the human geography of the Qatar peninsula, from the middle of the 19th Century until the Al-Thani attack on Zubarah in 1937, is best described as having been divided into three spheres of which the Al-Thani controlled only the smallest and least significant one:

³⁶ For example, see QM para. 3.22.

³⁷ For example, see QM paras. 3.22, 3.26, 3.30 and 3.33.

³⁸ BM Chapter 2.

³⁹ See Sections 2.2.B and 2.2.C.

⁴⁰ See Sections 2.2.E and 2.2.F.

- (a) the Naim-led tribal confederation in the north (whose allegiance lay with the Al-Khalifa dynasty);⁴¹
- (b) the Bedouin tribes of Eastern Arabia who occasionally grazed their flocks in the south of the Qatar peninsula on a seasonal basis (whose allegiance lay with the Al-Saud dynasty);
- (c) the pearl-merchant enclave in Doha (the tiny Al-Thani-led Doha confederation, dominated by the larger, more powerful and tribal-based Bahraini and Saudi sphere of influence described under (a) and (b)).

41. This remained the political demography of the Qatar peninsula until 1937, notwithstanding embryonic formal divisions of territory among three states: Bahrain, Saudi Arabia, and "Qatar". The Doha confederation expanded beyond the hinterland of Doha only in 1935 when Britain finally agreed to protect it from Saudi Arabia to the south.⁴² Subsequently empowered by that protection and inspired by the promise of oil wealth, the Al-Thani invaded Zubarah in 1937.

C. The Naim tribe who occupied the Zubarah Region maintained their allegiance to the Al-Khalifa Rulers

42. Historical records establish that the Naim were invited by the Al-Khalifa to help the latter assert their authority over the local tribes that lived in the north of the Qatar peninsula shortly after the Al-Khalifa arrived there in 1762.⁴³ The Naim tribe and the Al-Khalifa quickly entered into a mutually advantageous relationship of Ruler/benefactor and dependent/beneficiary. The Al-Khalifa benefited from having a loyal ally helping to control new territories in the Qatar peninsula. The Naim tribe

⁴¹ Section 2.2.C.

⁴² BM Section 2.2.

⁴³ Lorimer *op. cit.*, Vol. II, p. 1306, BM Ann. 74, Vol. 3, p. 397.

benefited from receiving the favours of the Al-Khalifa. The Naim's ties to the Al-Khalifa were also based on the latter's control of the Qatar peninsula, of the islands of Bahrain, and of the Bahrain pearling banks. Additional details regarding the relationship between the Ruler of Bahrain and the Naim tribe have already been provided in Bahrain's Memorial.⁴⁴

43. Having transferred their seat of authority from Zubarah to the main island of Bahrain at the end of the 18th Century, the Al-Khalifa Rulers appointed governors in the Qatar peninsula.⁴⁵ The allegiance of the Naim tribe assisted Bahrain and its governors in their exercise of authority over the Qatar peninsula⁴⁶ and in turn enabled the Naim to consolidate their leadership of the confederation of tribes in the northern part of the peninsula. Thus, for example, the Naim-led northern tribal confederation participated in Muhammed bin Khalifa's 1848 victory over a challenger to his throne.⁴⁷ Similarly, in 1870, British despatches reported that the Naim, who remained followers of the Ruler of Bahrain, had defeated the Beni Hajir tribe, who had been plotting against him.⁴⁸

44. Qatar has claimed that Zubarah "ceased to exist as a populated place in the 19th century."⁴⁹ Qatar presents no evidence to support its claim. It is true that the city of Zubarah was sacked twice: once in 1809 by Bedouin from the Arabian peninsula and once in 1811 by the Sultan of Muscat, as described in Bahrain's Memorial.⁵⁰

⁴⁴ BM Section 2.1.

⁴⁵ It was at the time of the Al-Khalifa conquest of the islands of Bahrain from their base in Zubarah in 1783 that the Al Jabr branch of the Naim tribe gained the primacy that it retained thereafter. Montigny-Kozłowska p. 137, Ann. 119, Vol. 2, pp. 378-382. See also BM Section 2.1.

⁴⁶ For example, for protecting tribes of Qatar. See Understanding between representative of the Ruler of Bahrain and representative of the Sheikhs of the Doha confederation, 10 April 1869. Ann. 5, Vol. 2, pp. 10-12.

⁴⁷ QM Ann. II.69, Vol. 5, p. 350.

⁴⁸ Report to British Political Resident, 1 May 1870. Ann. 8, Vol. 2, pp. 16-17.

⁴⁹ QM para. 8.3.

⁵⁰ BM para. 113.

Nonetheless, as described above, the northern part remained the population centre of the Qatar peninsula, with some 3,000 of the 3,500 inhabitants of the Qatar peninsula living there in the 1820s. Captain Brucks, in his 1821-1829 Arabian Coast survey, observed that Zubarah, although reduced in importance, nonetheless still had inhabitants who were subject to Bahrain and who exported horses.⁵¹ There is no evidence that the Naim tribe left their traditional *dirah* (tribal domain) at this or any other time.⁵² They continued to live in the Zubarah Region throughout the 19th and 20th Centuries until the Al-Thani attack in 1937.⁵³

45. Qatar has wrongly claimed that the Naim tribe left Zubarah in 1878, with the majority moving to Doha.⁵⁴ This claim is contradicted by records from 1873 onward of the Naim tribe inhabiting the Zubarah Region.⁵⁵ In 1886-1887, British reports noted that secessionists from the Doha confederation had settled in the north of the Qatar peninsula:

"... where they are to some extent under the protection of the Noeym [*i.e.*, Naim] tribe who maintain intimate friendly relations with the Chief of Bahrain."⁵⁶

In addition, an 1893 report by the Ottomans confirmed that the Naim tribe was living in the Qatar peninsula, that its tribal *dirah* included Zubarah, and that it was a Bahraini tribe.⁵⁷

⁵¹ Brucks, *op. cit.* p. 112, BM Ann. 7, Vol. 2, p. 97.

⁵² For a discussion of the tribal *dirah* of the Naim, see BM Section 2.1.

⁵³ BM Section 2.1.

⁵⁴ QM para. 8.21.

⁵⁵ BM Section 2.1.

⁵⁶ Residency and Muscat Political Agency Report for 1886-1887, p. 7. Ann. 18, Vol. 2, p. 44.

⁵⁷ Ottoman Report on Qatar, 22 September 1893, at p. 8. Ann. 25, Vol. 2, pp. 69-86.

46. Qatar also claims that the Naim were not Bahraini and that Britain "rejected Bahrain's allegations" that they were.⁵⁸ The historical record from 1873 cited by Qatar as support for this claim does not support this assertion. The extract quoted by Qatar is unrelated to the issue and the relevant part of the document is not mentioned by Qatar. With reference to Bahrain's claim in relation to the Naim, British officials admitted that they were aware of the claim, but were not willing or able to evaluate the claim at that point:

"In a conversation with Major Grant, the Chief of Bahrein claimed the Naim tribes, living near Zobarah, as his subject under treaty, and stated that when he became Chief of Bahrein, the Chief of the Naim tribe had in Colonel Pelly's presence acknowledged subjection to Bahrein under treaty. Major Grant wrote to Colonel Ross that he had no means of forming an opinion on the claim advanced by the Bahrein Chief to sovereignty over the Naim tribe ...

Colonel Ross replied on receiving Major Grant's report that though the matter of sovereignty over Katar had apparently never been formally decided, still the Turkish authorities in Nejd had established an influence over the Katar Coast as far as the Odeid boundary. He thought the Bahrein Chief had not the power, if he wished, to protect tribes residing in Katar, and that he could not expect Government to interfere where the rights were involved in uncertainty. The Chiefs allied with Bahrein could choose between remaining where they were and removing to Bahrein with the latter's permission.

... In writing to Government, Colonel Ross thought that, as the question of sovereign and feudal rights over places and tribes on the mainland of Arabia opposite to Bahrein, was a complicated one, probably Government would not deem it practicable or expedient to enter into its merits."⁵⁹

That early uncertainty was eventually replaced by Britain's recognition of Bahrain's relationship with the Naim.⁶⁰ Thus both Britain and the Ottomans recognised the Naim as being a Bahraini tribe.

⁵⁸ QM para. 8.16.

⁵⁹ QM Ann. II.7, Vol. 4, p. 53.

⁶⁰ See BM Section 2.1 and Section 2.2.C of this Counter-Memorial.

47. Though the evidence about Zubarah from the 19th Century is episodic, it is nonetheless consistent in showing the presence of the Naim in the Zubarah Region.

48. In 1880, Sheikh Nasir, a pretender to the Bahraini throne, about whom more is said below in Section 2.2.H.(ii) below, arrived with his Al-Thani ally in the northern part of the Qatar peninsula in order to invade Bahrain. They were prevented from so doing by the inhabitants who refused to lend them their boats and even threatened to scupper them should they be taken by force.⁶¹ This is further evidence of the continuing ties to Bahrain of the Naim confederation.

49. In addition to the historical records described above and in Bahrain's Memorial, there are British records from 1887 and 1888 of the Naim Sheikhs' visits to the Ruler of Bahrain to request assistance in their tribal struggles and in their struggles against the Doha confederation.⁶² In these records it is noted that the Ruler of Bahrain referred to the Naim as his "people" and his "dependants." In 1888, the Ruler of Bahrain reassured his "dependants" the Naim that they could settle in the main island of Bahrain if they were pressured by Sheikh Jasim Al-Thani.⁶³ An Ottoman report on Qatar from 1893, referred to above, lists the Naim tribe as one of the three principal tribes of the Qatar peninsula. The report noted that the Naim tribe lived in the Qatar peninsula, that its tribal *dirah* included Zubarah, and that:

"... it moves to Bahreyn in the date season and the Shaikh of Bahreyn, Sheikh Isa, every year gives it a present of dates, coffee, etc. This means that the said tribe is basically reckoned among the tribes of Bahreyn."⁶⁴
(Emphasis added.)

⁶¹ Report from Lieutenant Stock to Commander G.W. Hand (H.M.S. Beacon, Senior Officer in Persian Gulf), 4 December 1880. Ann. 16, Vol. 2, pp. 39-40.

⁶² Reports Bahrain News agent, 29 December 1887 and 3 January 1888; Ruler of Bahrain letter to British Political Resident, 4 January 1888. Ann. 20, 21, 22, Vol. 2, pp. 46, 47-48, and 49.

⁶³ Despatch from Bahrain News Agent, 3 January 1888. Ann. 21, Vol. 2, p. 47-48.

⁶⁴ Ottoman Report on Qatar, 22 September 1893, at p. 8. Ann. 25, Vol. 2, pp. 69-86.

50. This Ottoman report is describing evidence of *ikrimiyyah* – the system of benefits that were received by important Arab tribes from their Rulers. *Ikrimiyyah* was an integral part of the relationship between the Al-Khalifa and the Naim tribe. In 1869, the Ruler of Bahrain assigned to the Sheikh of the Naim tribe part of the taxes and tribute payable to him by the Doha confederation.⁶⁵ In 1875, it was reported that the Ruler of Bahrain:

"[spent] three to four thousand krans every month on the people of Zobarah, and gives Nasir bin Jabor [the Naim headman] 300 Krans per mensem [month]."⁶⁶

51. The British Persian Gulf Administrative Report for 1886-1887 recorded:

"The Chief, Shaikh Eesa-bin-Ali, continues to maintain intimate friendly relations with the Na'eem tribe of the mainland, to whom, and to other Arabs of the mainland, he makes yearly presents of considerable value. Indeed a large portion of the revenues of Bahrain are dissipated in this manner without any ostensible compensating advantage."⁶⁷

Bahrain Civil Lists and Pension Lists from the 1920 included members of the Al-Jabr branch of the Naim tribe – including their Chief.⁶⁸ In the same manner, the Bahrain civil lists from the late 1930s reveal that even the Al-Jabr Chief of the Naim tribe was still a recipient of financial support from the Ruler of Bahrain.⁶⁹ Other evidence of

⁶⁵ Understanding between representative of the Ruler of Bahrain and the representative of the Sheikhs of the Doha confederation, witnessed by the Assistant British Political Resident, 10 April 1869. Ann. 5, Vol. 2, pp. 10-12.

⁶⁶ Letter from News Agent, Bahrain, 16 March 1875. Ann. 13, Vol. 2, p. 35.

⁶⁷ Persian Gulf Administrative Report 1886-1887, p. 6. Ann. 19, Vol. 2, p. 45.

⁶⁸ Request for Civil List Fund Transfer from Bahrain Government to Eastern Bank Ltd. 1923-1924, Ann. 54, Vol. 2, pp. 173-174; Letter from Manager of Eastern Bank Ltd. to the Ruler of Bahrain, 19 January 1925, Ann. 55, Vol. 2, pp. 175-182; Letter from Manager of Eastern Bank Ltd. to the Office of the Deputy Governor of Bahrain, 15 September 1925, Ann. 55, Vol. 2, pp. 183-191.

⁶⁹ BM para. 86.

ikrimiyyah from the Ruler of Bahrain to the Naim was described in Bahrain's Memorial.⁷⁰

52. In return for this support, the Naim tribe paid taxes to the Ruler of Bahrain,⁷¹ acted as his guards,⁷² and performed a variety of services for him.⁷³

53. The relationship between the Ruler of Bahrain and the Naim was acknowledged by Jasim bin Thani. One of many such examples comes from the British records of 1880, in which there is a letter from Jasim to the British Political Resident that states:

"Sheikh Esau [the Ruler of Bahrain] has kept his friends at Fueyrat, and is sending the Naeem to them, and they always commit disturbances at Katr, and if he allowed the Naeem to remain at Fueyrat and create disorders at El Katr, there will be no end to disturbances; let these people either go to Bahrein or come to El Bida, in order that disorders may cease."⁷⁴

54. In the first decade of the 20th Century, the weak and fractured leadership of the Al-Thani caused many inhabitants to leave the Doha enclave (see Section 2.2.H.(v) below). In contrast, the loyalty to Bahrain of the Naim-led tribal confederacy in the north of the Qatar peninsula remained undisputed. Captain Prideaux, the British Political Agent, was witness to that fact in 1906 when he enquired about a shipwreck off the northern coast of the peninsula. The local shaikh insisted that he was a subject of the Ruler of Bahrain and directed Prideaux to address any questions to the Ruler.⁷⁵

⁷⁰ See BM Section 2.1.A.

⁷¹ This particular payment was referred to by the Naim themselves as *jazi'a* (or *jizya*), which means payments made by those considered to be under protection. See Montigny-Kozłowska, *op. cit.*, p. 67. Ann. 119, Vol. 2, pp. 378-382.

⁷² Despatch from British Political Resident, 18 November 1869. Ann. 6, Vol. 2, p. 13.

⁷³ See BM Section 2.1 and this Section of the Counter-Memorial.

⁷⁴ Translated purport of a letter from Jasim bin Thani, El-Bida, to Resident, Bushire (included in a collection of 1880 correspondence). Ann. 14, Vol. 2, p. 36.

⁷⁵ Despatch from British Political Agent, to the British Political Resident, 3 February 1906. Ann. 32, Vol. 2, pp. 106-107.

55. This relationship between the Ruler of Bahrain and the Naim still existed in 1937, when Sheikh Abdullah Al-Thani attacked Zubarah.⁷⁶ Even at that stage, the loyalty of the Naim to the Ruler of Bahrain – as well as their antagonism towards the Al-Thani – was evident. On the eve of the attack, the British Political Resident cabled to the Secretary of State for India:

"Zubarah. As you are aware Shaikh of Bahrain has an old standing claim, as against the Shaikh of Qatar, to Zubarah ... Political Agent, Bahrein, telegraphs that, in connection with this claim a somewhat serious situation has arisen, briefly as follows. (a) Sheikh of Qatar has ordered Rashid, head of section of Naim tribe living at Zubarah, to state his loyalty to him (the Shaikh) or be punished. (b) Attitude of Naim is reported to be that, if they do not receive support from the Shaikh of Bahrain against the Shaikh of Qatar, they will "adhere to Ibn Saud"."⁷⁷

That the Al-Thani demanded the allegiance of the Naim in 1937 testifies to the fact that it had not yet been declared.

56. There is ample evidence that the Naim-led confederation was integrated into the political economy of Bahrain, which extended throughout the islands of Bahrain and the northern Qatar peninsula. Until the 1937 Al-Thani attack, the Naim customarily travelled between the Zubarah Region and the islands of Bahrain. Many Naim families had homes both in Zubarah and the islands. One historian has described the Naim's seasonal migration as follows:

"[T]he migration by boat, which informants in Bahrain in 1986-1987 also told about, was from Zubarah to Jau and Askar on the west coast of Bahrain, and it took place with families, small animals, and even camels, and to a lesser degree horses. In Bahrain the bedouins stayed in palm leaf huts (*basrati*) close to wells where they had traditional rights or near the sea, e.g. on small uninhabited islands. They grazed their animals in the

⁷⁶ See BM Sections 2.11 and 2.13.

⁷⁷ Telegram from the British Political Resident to the British Secretary of State for India, 28 April 1937. Ann. 82, Vol. 2, pp. 259-259b.

southern desert, as well as in the palmgrove area of the north. They were involved in carrying traffic."⁷⁸

57. The seasonal patterns of pearling, fishing, winter and summer grazing, date harvest and trade made the area a single political economy, as it had been for millennia.⁷⁹ The fact that there was sea between the two land masses did not signify a division. On the contrary, for these seafaring peoples, the sea united them. This factor was well stated by C.E.M. Hemingway of the India Office, in a letter to the Foreign Office dated 12 May 1939, where he made the point in relation to the Hawar Islands that:

"... in so maritime an area as the S. coast of the Persian Gulf, the 20 miles of easily navigable sea between ... [the Hawar Islands] and Bahrain main island would be more of a link than a division. The persistence of the Sheikh of Bahrain's interest in Zubarah is an instance of the importance of this factor."⁸⁰

D. Qatar's description of the "ancient" history of Zubarah prior to its founding by the Al-Khalifa in 1762 is inaccurate and misleading

58. Qatar's Memorial makes the claim that Zubarah was settled in ancient times and that during the 17th and 18th Centuries it was one of the principal merchant towns in the Gulf of Arabia.⁸¹ Most of the alleged evidence presented by Qatar in support of this claim is drawn from the 81 forged documents and will not be addressed.

59. An authentic document is reproduced in Annex III.298, Vol. 8, p. 493 of Qatar's Memorial – a 1986 Arabic history book by Mohamed Khalifa Al-Nabhani – in support

⁷⁸ Klaus Ferdinand Bedouins of Qatar (1993), p. 41. BM Ann. 232, Vol. 4, p. 1013. See also BM Section 2.1.

⁷⁹ See discussion of Greater Bahrain in Section 2.2.A.

⁸⁰ Letter from C.E.M. Hemingway (I.O.) to Foreign Office, 12 May 1939. BM Ann. 163, Vol. 4, pp. 744-746.

⁸¹ QM paras. 8.3 and 8.7.

of Qatar's claim that a town existed at Zubarah from early Islamic times.⁸² However, Qatar has mistranslated this document and used it out of context.⁸³ Al-Nabhani's book refers to the ancient Arab town of al-Zara, but Qatar's mis-translation has transformed the radicals ZA(W)R (al-Zara) into ZBR (Zubarah). This is a spectacular mistake. The author's intention to refer to al-Zara, and not Al-Zubarah, is confirmed in a different part of the same document, cited by Qatar as its Annex II.69, where Zubarah is referred to by Al-Nabhani with the appropriate Arabic radicals "ZBR".

60. This mistranslation aside, it is quite incredible that Qatar is trying to use Al-Nabhani's book to equate al-Zara with Zubarah. Al-Nabhani's book does no more than recount the well-known history of the Islamic conquest of Greater Bahrain, which is described in many Arabic sources. Al-Zara was on the main Arabian coast, almost certainly in the Qatif area. Accounts talk of its major spring ('Ayn al-Zara)⁸⁴, in complete contrast to Zubarah which had no proper water supply.

61. Qatar cites Al-Nabhani again in Annex II.69 to support the proposition that

"The local sheikhs laid down a condition for their [the Al-Khalifa] settlement: if they were to trade in Zubarah, they would have to pay the usual taxes. The [Al-Khalifa] refused this condition and in 1768 built the fort known as Murair at some distance outside the outer wall of Zubarah."⁸⁵

Once again, the document cited by Qatar does not support the proposition for which it has been invoked. In fact, it stands for entirely the opposite. This is yet another example of the selective misquotation of evidence throughout Qatar's Memorial. The

⁸² QM para. 8.7.

⁸³ See review of evidence in F. Wüstenfeld, Bahrein und Jemäma, (1874), pp. 6-10. Ann. 10, Vol. 2, pp. 25-29.

⁸⁴ See, in particular, Abu Mansur in Yaqut [1179-1228 AD] Mu'jam al-Buldan. Ann. 3, Vol. 2, p. 6.

⁸⁵ QM para. 8.9.

cited text actually refers to the local sheikhs "wanting to impose a tribute" on the Al-Khalifa. But the timing of their demand was, significantly:

"After they [the Al-Khalifa] had settled in Zubarah and established their rule there"⁸⁶ (Emphasis added.)

Qatar fails to note that the text goes on to relate that:

"Sheikh Mohammed [Al Khalifa] refused to pay the tribute and fortified himself in Zubarah by building a fort which is called today the Fort of Murair."⁸⁷ (Emphasis added.)

Qatar fails to mention that the Al-Khalifa defeated the local sheikhs at the Battle of Sumaysma shortly after this demand, following which the Al-Khalifa forces largely destroyed their town.⁸⁸ Furthermore, Qatar also fails to note that the same author, in the same text, attributes the founding of Zubarah to the Al-Khalifa in the mid-18th Century (contrary to Qatar's thesis).⁸⁹

62. In other words, even the historical accounts upon which Qatar relies do not support its claim that there existed an ancient Zubarah before the Al-Khalifa.

63. The true history of Zubarah and the Al-Khalifa was recounted in Section 2.2 of Bahrain's Memorial. Both Arab and Western historians date the founding of Zubarah from the middle of the 18th Century. They also establish that Zubarah was founded by the Al-Khalifa.⁹⁰ Indeed, the fort built there by the Al-Khalifa was originally called "Sabha" from the name of an original fort in the Utub (the Al-Khalifa tribe's homeland)

⁸⁶ Al-Nabhani, pp. 82-83. QM Ann. II.69, Vol. 5, p. 340.

⁸⁷ *Ibid.*

⁸⁸ Bahrain Historical Document Centre Al Watheeka (Vol. 4) [1984]. Ann. 118, Vol. 2, pp. 373-377.

⁸⁹ QM Ann. II.69, Vol. 5, p. 340.

⁹⁰ BM paras. 106-107.

and was built in such a way as to secure a water supply for Zubarah.⁹¹ From the earliest days of the Al-Khalifa settlement of Zubarah, the Al-Khalifa developed strong bonds with the local tribes of the Zubarah Region by virtue of economic influence, political control, and intermarriage.

64. The archaeological evidence is equally clear in dating Zubarah to its foundation by the Al-Khalifa. In his book Looking for Dilmun, Geoffrey Bibby, leader of the Danish archaeological team that visited Zubarah in 1956, states unequivocally:

"We had been rather chary of visiting Zubara, for our motives might well be misunderstood, both by Sheikh Sulman of Bahrain and by Sheikh Ali of Qatar. For Zubara is the ancestral home of the sheikhs of Bahrain, a town in which the Al-Khalifah family had settled when, in the middle of the eighteenth century, they had moved south from the neighbourhood of Kuwait. ...

We had to see it. Although we ran the risk of being deemed Bahraini spies, there was a possibility that Zubara was an ancient town ...

[A]fter lunch we collected potsherds, though we could already see that Zubara was no ancient city. There was no tell [a mound created by the remains of ancient settlements], except one in the making. The buildings that were crumbling to ruins about us and being covered with sand would one day be an even flattish mound that future inhabitants of Qatar might well choose as a site for a new city. But these buildings were themselves built upon the naked rock and sand of the foreshore – there had been no city before the Zubara of the Al-Khalifah."⁹² (Emphasis added.)

65. These facts, together with those recounted in Bahrain's Memorial, demonstrate that Qatar's description of Zubarah is inaccurate and misleading.

⁹¹ Lam'al Shehab, *Fi Sirat Muhammad b. 'Abd Al-Wahhab'* (Edited by A.M. Abu Hakima), (1967), p. 78. Ann. 113, Vol. 2, pp. 355-356.

⁹² G. Bibby, Looking for Dilmun, (1970), pp. 122-123. Ann. 115-116, Vol. 2, pp. 364-366.

E. Qatar's description of the history of the Qatar peninsula until the middle of the 19th Century prior to 1871 is inaccurate and misleading

66. Qatar's Memorial wrongly describes regional history during the period prior to 1871, apparently in the hope of supporting its claim that there existed an independent State of Qatar.⁹³ As has been pointed out before, this argument rests primarily on forged documents.

67. The few authentic documents presented by Qatar are disingenuously misquoted and used out of context. For example, paragraph 3.25 of Qatar's Memorial states:

"Despite assurances by Britain that it would protect Bahrain, the Bin Khalifa nevertheless acknowledged Egyptian supremacy in 1839 and paid tribute to the Egyptians, themselves vassals of the Porte, in that year".

This statement is inaccurate and misleading. First, Britain did not give assurances of protection to Bahrain until 1861.⁹⁴ Second, the Egyptian military expedition into the Arabian peninsula was extremely short-lived (from 1839 to 1840). Third, the expedition followed Egypt's declaration of independence from the Ottoman Empire on 25 May 1838. Fourth, the Ruler of Bahrain merely temporised with the Egyptian general, Khurshid Pasha, to enable Bahrain to retain its independence. British records note that the Ruler of Bahrain:

"considered his own interests were best consulted by his agreeing to pay the Pacha so trifling a sum as 2,000 dollars a year, to secure the integrity of his own territories, and the undisturbed possession of his own authority over them."⁹⁵

⁹³ See QM Chapters III and VIII.

⁹⁴ See Terms of Friendly Convention between Ruler of Bahrain and the British Government, 31 May 1861 (C.U. Aitchison, A Collection of Treaties Engagements and Sanads, (1933), (hereinafter Aitchison's Treaties), Vol. XI, pp. 234-236); BM Ann. 8, Vol. 2, pp. 110-113.

⁹⁵ Warden et al., Historical Sketch of the Uttoabee Tribe of Arabs (Bahrein), 1856 from Selections from the Records of the Bombay Government, No. XXIV, New Series 1850 pp. 361-425, in Records of Bahrain, p. 47. BM Ann. 5, Vol. 2, p. 41.

Fifth, Qatar's Memorial fails to relate that the Egyptian invasion ultimately failed.⁹⁶ The situation rapidly returned to the *status quo ante* with the collapse of an independent Egypt in 1840. There is no basis for even suggesting that this episode involved Bahraini acknowledgement of Ottoman supremacy.

68. Similarly, Qatar's Memorial seeks to give the impression that Bahrain and the Qatar peninsula were separate entities that were treated separately in terms of relations and conflicts with the Wahhabi Emir and the Ottomans.⁹⁷ This was not so. In the 1850s, there were conflicts between Bahrain and the Wahhabis over control of the Qatar peninsula. But the Qatar peninsula – including the Doha confederation – was the object of this struggle, not a participant. Thus, in 1851, the Wahhabis wrested Doha from Bahrain, whereupon the Ruler of Bahrain blockaded Doha by sea.⁹⁸ Eventually, the Sheikh of Abu Dhabi mediated a resolution to the conflict whereby Doha was restored to Bahrain and the Wahhabi Emir retreated to the Arabian hinterland.⁹⁹ Rather than providing support for Qatar's claim that there existed a unified Qatar under the Al-Thani at this time, this incident confirms Bahrain's sovereignty over the Qatar peninsula.

69. This was further confirmed by the British Political Resident in his report of 1854 in which he declared unequivocally that:

"The territory of Bahrain consists of the two islands of that name and the line of coast extending from the bottom of the Bight in which they are situated to the Khor al Odaid [Odeid]".¹⁰⁰ (Emphasis added.)

⁹⁶ Warden, *op. cit.*, at p. 48. BM Ann. 5, Vol. 2, p. 42.

⁹⁷ For example, see QM at Chapter III Sections 2, 3 and 4.

⁹⁸ The LeQuesne Report on the Boundary between Saudi Arabia and Shaikhdoms of Qatar and Abu Dhabi and the Sultanate of Muscat and Oman, 1953, hereinafter the LeQuesne Report, at p. 91. Ann. 110-112, Vol. 2, pp. 340-352.

⁹⁹ There is also evidence that Bahrain agreed to pay four thousand dollars to the Wahhabi Emir as part of this mediation in return for a guarantee from the Wahhabis not to trouble Bahrain's dominions.

¹⁰⁰ LeQuesne Report, *op. cit.*, p. 90. Ann. 110-112, Vol. 2, pp. 340-352.

The "line of coast" described runs from the deepest indent of the Bay of Bahrain on the coast of the Arabian peninsula (on the west side of the Qatar peninsula) all the way around the Qatar peninsula to Abu Dhabi on the east. In other words: the territory of Bahrain consisted of the islands of Bahrain and the entire Qatar peninsula. Nothing during the 19th Century dislodged Bahrain's authority from the Doha region of the peninsula until the Ottoman invasion of Arabia in 1871. Qatar's description is thus baseless and misleading.

F. Qatar claims falsely that Britain and Bahrain acknowledged the Qatar peninsula as a territorial unit under Al-Thani control from the mid-19th Century

70. Qatar's Memorial claims that Britain and Bahrain recognised Al-Thani control of the Qatar peninsula and recognised the integrity of the Qatar peninsula from the mid-19th Century.¹⁰¹ Even leaving aside the part of this assertion that is based on forged documents, Qatar's claim is inaccurate and misleading. In the mid-19th Century the Qatar peninsula as a territorial unit remained under Bahrain's control.

71. In describing Britain's early involvement in the region, Qatar's Memorial (paragraphs 3.3 to 3.10) attempts to equate Britain's treatment of Bahrain with its treatment of the Trucial sheikhs. This is entirely inaccurate. Bahrain was not part of the Pirate Coast and, contrary to Qatar's unsubstantiated assertion in paragraph 3.6, there were no military operations conducted against Bahrain by Britain at that time. On the contrary, Bahrain's traditional dominance of the middle part of the Arab Gulf littoral led Britain to acknowledge its different status. Britain's policy towards Bahrain was expressed by the Governor of Bombay on 15 December 1819 as:

"[To] abstain from all interference ... so long as he [the Ruler of Bahrain] restrains his tribes from [piracy] ... [i]f any indications of a piratical spirit

¹⁰¹ QM paras. 3.38, 3.39, 5.1, 8.12, 8.23, 8.24, 8.27, 8.28, 8.29, 8.30.

should manifest themselves, we shall be compelled to adopt those measures of coercion [sic] which we are prosecuting against the [Trucial sheikhs]."¹⁰²

72. Britain considered that the 1820 General Treaty, to which Bahrain – but no other political entity related to the Qatar peninsula – was a party, included the territory of the Qatar peninsula by virtue of its being a dependency of Bahrain.¹⁰³ Qatar's Memorial itself expressly acknowledges that Britain considered that the General Treaty of Peace applied to the Qatar peninsula.¹⁰⁴

73. There are other manifestations of Britain's view that the Qatar peninsula fell within the territory of Bahrain:

- In 1823 Lieutenant McCloud toured the Arab littoral of the Gulf of Arabia to compile a register of shipping. His reports note that in Doha, the local sheikh confirmed that he was a dependent of Bahrain. After having obtained a list of the local shipping there, Lieutenant McCloud continued on to the main island of Bahrain where he satisfied himself that the Ruler of Bahrain was indeed in a position to exercise proper oversight and control of the ships that were based in Doha.¹⁰⁵

¹⁰² J.B. Kelly, *Britain and the Persian Gulf*, (1968) pp. 162-163. Ann. 114, Vol. 2, pp. 357-363. Contrary to the implication contained in Qatar's Memorial that Bahraini ports were patrolled, as was the case on the Trucial Coast, no British naval vessels surveyed the Bahraini ports during the years that followed. (Lorimer, *op. cit.*, Vol. IB, p. 848. Ann. 45, Vol. 2, pp. 136-131.) Nor was Bahrain a signatory to the First Maritime Truce of 1835 (renewed periodically) between the sheikhs of the Trucial Coast. Indeed, Bahrain's territory, including the Qatar peninsula, was protected after 1836 from attack by the Trucial Sheikdoms through Britain's enforcement of the maritime peace by virtue of the 1835 Truce. J.B. Kelly, *op. cit.*, (1968) pp. 360-363. Ann. 114, Vol. 2, pp. 357-363. It is misleading to attempt to assimilate Bahrain into the Trucial system, based on a very different form of relationship with the minor sheikhs located there and to which, very belatedly, the Al-Thani were added, partially in 1916 and more fully in 1935.

¹⁰³ Lorimer, *op. cit.*, Vol. I, pp. 793-794. BM Ann. 83, Vol.3, pp. 446-447. Indeed, a footnote to Lorimer's text states: "The registration of ships, as observed in the history of Trucial Oman, ultimately proved to be impractical and was abandoned; but, in view of the indefinite status, replete with political difficulties into which the Qatar promontory has now lapsed, it is much to be regretted that our officers did not continue to insist, as they did in Trucial Oman, on the use of the Trucial flag. In this there could have been no real difficulty so long as Qatar remained under the Shaikhs of Bahrain; and the maintenance of the flag might have stereotyped the dependence of Qatar on Bahrain, and with it the principle of British control over Qatar". (Emphasis added.)

¹⁰⁴ QM para. 3.20.

¹⁰⁵ Macleod Report, 27 February 1823, QM Ann. II.15, Vol. 5, p. 17. Lorimer, *op. cit.*, Vol. I, pp. 793-794. BM Ann. 83, Vol. 3, pp. 446-447.

- In 1854, the British Political Resident reported to the Government of Bombay that Bahrain's territory included the Qatar peninsula.¹⁰⁶
- In 1859, Britain fined the Ruler of Bahrain two hundred dollars in respect of a piracy committed by the inhabitants of Doha.¹⁰⁷
- In 1863, the British Political Resident described his proposed tour of the Gulf as starting in Bahrain and then proceeding:

"to the southward of that Chief's Country and passing along the coast line to visit the Chiefs of Abotabhee, Dibaye, Sharga, Asjman Amalajoru and Rasul Khyma."¹⁰⁸

Clearly the fact that the British Political Resident considered the first chief south of the Ruler of Bahrain's territory to be the Ruler of Abu Dhabi excludes the possibility that the Al-Thani or the Doha enclave were considered to be separate from Bahrain.

74. In 1861, partly in order to stop the sea warfare between Bahrain and the Wahhabis, Britain concluded a Perpetual Treaty of Peace and Friendship with Bahrain. Under the 1861 Treaty, Bahrain undertook to refrain from all maritime aggression, and Britain undertook to provide Bahrain with support in the maintenance of security of its possession against aggression.¹⁰⁹

75. The treatment of this event in Qatar's Memorial¹¹⁰ fails to mention that Britain's protection was for "the maintenance of the security of [Bahrain's] possessions", including the Qatar peninsula. The fact that it applied to the Qatar peninsula was demonstrated shortly after the 1861 Treaty was ratified. In 1861-1862, ten years after they had last been repulsed from the Qatar peninsula by Bahrain, the Wahhabis began to

¹⁰⁶ LeQuesne Report, *op. cit.*, p. 90. Ann. 110-112, Vol. 2, pp. 340-352.

¹⁰⁷ *Ibid.*

¹⁰⁸ Report of the British Political Resident to the Political Department of the Government of India, 2 February 1863. Ann. 4, Vol. 2, pp. 7-9.

¹⁰⁹ 1861 Treaty, BM Ann. 8, Vol. 2, pp. 110-113.

¹¹⁰ QM para. 3.29.

interfere again in the Qatar peninsula. Bahrain invoked Article 2 of the 1861 Anglo-Bahraini Treaty, by which Britain had agreed to assist in the protection of Bahrain's territories.¹¹¹ On 8 February 1862, the British Resident sent a letter to the Ruler of the Wahhabis, warning that if the Wahhabis did not desist from their activities in the Qatar peninsula, the Ruler of Bahrain would be free to "exercise his legitimate rights and privileges", including by sea, and that Britain would respect and uphold any such response by Bahrain to protect its sovereignty over the Qatar peninsula.¹¹² The Wahhabi threat subsided. By 1866 Bahrain had reached an agreement with the Wahhabi Emir to secure Bahrain's possessions in the Qatar peninsula from aggression by other tribes from the Arabian peninsula.¹¹³

76. It was by virtue of the 1861 Anglo-Bahrain Treaty that Britain intervened in the 1867–1868 rebellion of the Doha confederation. As will now be shown, Britain's reaction to that event was in no way indicative – as claimed by Qatar – of a new British policy to consider Doha, much less the entire Qatar peninsula, as being somehow separated from the rest of Bahrain.¹¹⁴

¹¹¹ Article 2 stated:

"I agree to abstain from all maritime aggressions of every description ... so long as I receive the support of the British Government in the maintenance of the security of my possessions against similar aggressions directed against them by the Chiefs and tribes of this Gulf."

¹¹² Letter from Capt. Jones, British Political Resident, to Ruler of the Wahhabis, 8 February 1862. BM Ann. 9, Vol. 2, p. 114.

¹¹³ Lorimer, *op. cit.*, Vol. I, (1915), p. 800. BM Ann. 83, Vol. 3, p. 453.

¹¹⁴ The British-imposed maritime peace in the Gulf in no way altered the territorial integrity of individual sheikhdoms. For example, Britain recognised that Odeid belonged to the Shaikh of Abu Dhabi but refused to allow Sheikh Zayed to violate the maritime peace by putting to sea against the secessionist Qubaysat tribe, who had established themselves there by sea in 1878.

G. The events of 1867-1868 did not amount to recognition of an independent "State of Qatar", but rather the opposite

77. Qatar's Memorial claims that the events of 1867-1868 demonstrated the independence of Qatar from Bahrain.¹¹⁵ The contrary is true.

78. In 1867, in response to local resistance to his Governor in the Doha enclave, the Ruler of Bahrain, joined by the Ruler of Abu Dhabi, led a joint naval military operation to punish the insubordinate Doha confederation.¹¹⁶ Despite a request for assistance from the Doha confederation in 1868, the Wahhabis declined to involve themselves again in the Qatar peninsula.¹¹⁷ After the Doha confederation embarked on an unsuccessful naval raid against the main island of Bahrain, Britain intervened in accordance with the 1861 Treaty with Bahrain, to preserve the maritime peace.¹¹⁸

79. The British Political Resident extracted unilateral personal undertakings from the Rulers of Bahrain and Abu Dhabi, as well as from Muhammed bin Thani, chief of the Doha confederation, not to engage in naval military activities.¹¹⁹ Muhammed bin Thani bound himself to "maintain towards Sheikh Ali bin Khalifeh, Chief of Bahrain, all the relations which heretofore subsisted between me and the Sheikh of Bahrain".¹²⁰ The principal chiefs of the Doha confederation, describing themselves as living in the

¹¹⁵ QM paras. 3.38, 3.39, 8.12.

¹¹⁶ BM para. 126.

¹¹⁷ Lorimer, *op. cit.*, Vol. I, (1915), p. 801. BM Ann. 83, Vol. 3, p. 454.

¹¹⁸ BM paras. 126-130.

¹¹⁹ Aitchison's Treaties, *op. cit.*, pp. 236-237, 182-184 and 183-184 respectively. BM Ann. 317, Vol. 6, pp. 1414-1416, BM Ann. 14, Vol. 2, p. 161 and BM Ann. 12, Vol. 2, pp. 157-158. The undertaking of Muhammed bin Thani was discussed in BM paras.128-130. As the unilateral undertakings were personal in nature, unlike Britain's practice in relation to treaties with Arab rulers, none was ratified by Britain.

¹²⁰ Article 5 Agreement of Chief of El-Kutr engaging not to commit any Breach of the Maritime Peace, 1868, (Aitchison's Treaties, Vol. XI, pp. 183-184). BM para. 127. BM Annex 12, Vol. 2, pp. 156-158.

"province of Qatar", agreed that the taxes and tribute payable by them to Bahrain would be gathered from all of them on behalf of Bahrain by Mohammed bin Thani, acting as tax collector.¹²¹ Bahrain's Memorial, at paragraphs 127-130, demonstrates that the unilateral personal undertakings of the Rulers of Bahrain and Abu Dhabi and Muhammed bin Thani of 1868 were not treated by Britain as treaties.

80. Despite these facts, Qatar's Memorial imaginatively argues that the 1868 agreements (i) treated the Ruler of Bahrain and Muhammed bin Thani on an equal footing; and (ii) showed that the Ruler of Bahrain's authority did not extend to Qatar.¹²² The analysis above and in Bahrain's Memorial demonstrates this interpretation to be false.

81. Furthermore, while describing the events of 1867-1868, Qatar's Memorial¹²³ itself gives examples of the exercise of Bahrain's authority in the Qatar peninsula at that time:

- Bahrain arresting individuals in the Qatar peninsula;¹²⁴

¹²¹ Aitchison's Treaties, *op. cit.*, Vol. 2, p. 193. BM Ann. 13, Vol. 2, p. 160. The location of the tribes listed in the 1868 Agreement emphasises the fact that the payment from the "Qatar sheikhs" was only from those tribal groups constituting the Doha confederation. The source of the payments was very circumscribed geographically; it was Doha and its hinterland on the east of the peninsula, where relative prosperity had been founded on the eastern pearling zones. That geographical division reflected the practical political division between Doha and the rest of the Qatar peninsula. That political reality was inherited by the Ottomans in 1871. It remained until the Al-Thani attack on Zubarah in 1937.

¹²² QM para. 3.38. Qatar argues that both the Ruler of Bahrain and Muhammed bin Thani agreed to deliver a renegade Al-Khalifa sheikh to the British if he came into their control and that this showed that the Ruler of Bahrain's authority did not extend to Qatar. However, this argument is fallacious: the obligation of the Ruler of Bahrain was described as that of the Ruler of a territorial state ("To consider Mahomed bin Kalifeh as permanently excluded from all participation in the affairs of Bahrein and as having no claim to that territory, and in case of his returning to Bahrein promise to seize and make him over to the Resident") and the obligation of Muhammed bin Thani as personal ("If Mahomed bin Kalifeh fall into my hands, I promise to hand him over to the Resident").

¹²³ QM paras. 3.30-3.32.

¹²⁴ QM para. 3.30.

- Bahraini subjects in the Qatar peninsula apologising to the Ruler of Bahrain for their behaviour;¹²⁵
- the son of the leader of the Doha merchants supplicating the Ruler of Bahrain in relation to taxes;¹²⁶
- Bahrain imposing taxes throughout the Qatar peninsula;¹²⁷
- Bahrain defeating and punishing the Doha rebels;¹²⁸ and
- Bahrain rejecting Wahhabi interference in the affair.¹²⁹

Documents cited by Qatar also confirm Bahrain's submission that:

- the Al-Thani came to prominence in Qatar only in circa 1850;¹³⁰ and
- the insubordination of the Doha confederation was a result of unhappiness with a succession of Bahraini governors.¹³¹

82. Rather than providing evidence of an independent "State of Qatar", the historical record confirms the political subordination of the Doha confederation to Bahrain.

83. In 1868, Britain restrained the Shaikh of Bahrain from proceeding militarily by sea, even within his own territory and against his own subjects. Britain's action was based on an obligation that arose from the 1861 agreement, something that Qatar's Memorial itself acknowledges.¹³² It must be recalled that the Doha confederation was not a party to the maritime truce, as was confirmed by Britain as late as in 1888.¹³³ The

¹²⁵ QM para. 3.30.

¹²⁶ QM para. 3.30.

¹²⁷ QM para. 3.32.

¹²⁸ QM paras. 3.31, 3.33.

¹²⁹ QM para. 3.31.

¹³⁰ Montigny-Kozłowska, *op. cit.* QM Ann. II.74, Vol. 5, p. 399.

¹³¹ *Ibid.*

¹³² QM para. 3.34.

¹³³ India Office note to Foreign Office, 2 November 1888. Ann. 23, Vol. 2, p. 50.

fact that the principal Sheikhs of the Doha confederation were held in breach of that maritime truce clearly indicates that they too were subject to the 1861 Treaty. Since the Treaty was bilateral, as between Bahrain and Britain, the only basis on which it could be invoked against the Doha group was that Doha was a part of Bahrain.

84. Although Bahrain was punished by Britain in 1868 for violating the maritime peace of the 1861 Treaty, the Doha confederation was punished by Britain for its rebellion. In addition, the Doha confederation's submission to Bahrain was formalised, as evidenced by their promise to pay the annual tax and to obey Al-Khalifa authority, as "heretofore" (see paragraph 79 above and paragraphs 126 to 130 of Bahrain's Memorial).¹³⁴ Britain, acting according to the terms of article 3 of the 1861 Treaty which laid down that the British Political Resident was the guarantor of disputes, settled the existing dispute by guaranteeing that the tribute from the Doha confederation would be paid to Bahrain, and insisted that if any purported breach of the obligations arose the matter should be referred to the British Political Resident. In no way did this alter or diminish the integrity of the Ruler of Bahrain's territories.¹³⁵

85. Any doubt as to the respective roles of the Ruler of Bahrain, the Naim-led northern tribal confederation, the Al-Thani or the Doha confederation is dispelled by the Understanding reached between the representative of the Ruler of Bahrain and the representative of the Sheikhs of the Doha confederation, witnessed by the Assistant British Political Resident, on 10 April 1869. The relevant part of that document reads:

"We the undersigned Syad Maufid bin Syad Darweesh – authorised Agent on the part of Sheikh Alee Chief of Bahrein; and Khamees bin

¹³⁴ This intervention by Britain was similar to its intervention against an Al-Khalifa challenger in Hasa in 1861, following the signing of the 1861 convention.

¹³⁵ The British-imposed maritime peace in the Gulf in no way altered the territorial integrity of individual sheikhdoms. Pragmatically there was, of course, a consequential problem of how individual Rulers in the Gulf could deal with rebels in their territory where it was separated from the core of the state by sea. In the case of Bahrain the resolution to this problem was its use of reliable loyal forces in the dependent territory: the Naim confederation.

Jomar Bookourara – authorised Agent on the part of Sheikh Mohamed bin Tanee and all the other Chiefs of Guttur – who were depicted to the high in rank – Colonel Pelly Resident Persian Gulf for the purpose of communicating with him on Affairs connected with Guttur, have this day the 27th Tilhaj 1285 appeared before the said officer, and have, in his presence, mutually agreed and arranged, in regard to the amount of tribute payable on account of all the people of Guttur to Shaikh Alee bin Khuleefa Chief of Bahrein, as follows:

That a sum of nine thousand/9,000 Krans shall be paid every year on account of all demands from Guttur.

That of this amount the sum of 4,000 Krans will be paid to Rashid bin Jabbur Shaikh of the Naim tribe for his protecting Guttur, and his receipt will be taken and sent through the Resident, to the Chief of Bahrein.¹³⁶

This shows:

- the payment from the Doha confederation was tribute;
- that the Naim tribe was to act for the Ruler of Bahrain in collecting the tribute and protecting "Guttur";
- that the reference to the Sheikhs and people of "Gutter" was to the same configuration as that referred to in the 1868 tribute agreement – the Doha confederation;
- that, as part of their financial support from the Ruler of Bahrain, the Naim were to keep part of the tribute; and
- that Britain endorsed this arrangement.

86. Thus, as described in Sections 2.2 and 2.3 of Bahrain's Memorial, the events of 1867-1868 did not create an independent Doha – let alone an independent "Qatar." On the contrary, as described above, they confirmed the paramountcy of Bahrain.

87. Thus, Qatar's two contentions, at paragraphs 3.38 and 3.39 of its Memorial, that the events of 1867-1868 implied recognition of an independent Qatar and of a maritime buffer between Bahrain and Qatar are unwarranted and illogical. Qatar's reasoning on

¹³⁶ Understanding between the representative of the Ruler of Bahrain and the representative of the Sheikhs of the Doha confederation, 10 April 1869. Ann. 5, Vol. 2, pp. 10-12.

this point is tautological: (1) the embryonic political entity that came to be known as Qatar included the entire Qatar peninsula; (2) Bahrain did not include any of it; and (3) neither was to use naval power for military endeavours, from which it followed that their common boundary was the sea. The premises and the conclusion are fallacious, as has been demonstrated above.

H. Qatar claims falsely that a political entity called "Qatar" was recognised prior to 1916 and that it included the entire Qatar peninsula

(i) The Ottomans acknowledged that they never had any control outside the Doha enclave

88. Qatar's Memorial asserts that the Ottoman Empire and the Doha confederation exercised authority over the entire Qatar peninsula, and specifically over the Zubarah Region, from 1871 to 1916.¹³⁷ This is incorrect. Qatar's claim is based principally on the forged documents, which will not be addressed.

89. The events of 1867-1868 confirmed the authority of Bahrain in the Qatar peninsula. A number of leaders in Doha soon resumed their attempts to avoid Bahrain's dominion. To this end, in 1871, they instead subjected themselves to the authority of the Ottoman Empire, following the Ottoman invasion of Nejd (the Ottoman term for its territories in the Arabian peninsula). Although the Doha enclave succeeded in gaining autonomy from Bahrain in this manner, it controlled a very limited territory. Bahrain's Memorial adduced evidence showing that Ottoman and Al-Thani authority never extended beyond the enclave comprising Doha and its immediate hinterland, despite no less than six attempts to extend their authority to the Zubarah Region.¹³⁸ In any event,

¹³⁷ QM paras. 3.14, and 3.43-3.54, and QM Chapter VIII, Section 2.

¹³⁸ BM Section 2.7.

by 1874, the Doha confederation was under the control of an Ottoman-backed Al-Khalifa renegade.¹³⁹

90. In 1871, after the Doha confederation invited the Ottoman Empire to assume control over its territory, the Al-Thani were given four Ottoman flags. Qatar claims that this event signalled recognition that the Al-Thani controlled the entire peninsula.¹⁴⁰ What Qatar's Memorial omits to relate is that the Al-Thani were told to raise the flags on their territory. One of the flags was placed above Jasim bin Thani's house in Doha, the second was sent to Wakra a few kilometres south of Doha, the third was given to Ali bin Abd al-Aziz, chief of nearby Khawr, and the fourth was forwarded to a rebel Abu Dhabi tribe in Odeid, to the south of Doha.¹⁴¹ Thus, in 1871 the Al-Thani themselves evidently considered that their territory was confined to the area immediately in the vicinity of Doha and the south-east of the peninsula.

91. The Ottoman entry into Doha reinforced the split between the Doha confederation and the rest of the Qatar peninsula. Following the Ottoman invasion of Nejd in 1871, the real boundaries in the Qatar peninsula lay between the Bahraini northern and the increasingly Al-Saud southern Qatar peninsula. The latter occasionally formed the tribal grazing grounds of the great nomadic tribes of Eastern Arabia. These two were the principal political configurations that struggled for control over the Qatar peninsula from 1871 to 1937.

92. In contrast, Doha and its hinterland was a small commercial enclave on the east coast of the peninsula with a small Ottoman garrison. The authority of the Doha confederation did not extend outside that enclave. This was understood even by the

¹³⁹ Section 2.2.H.(ii).

¹⁴⁰ QM paras. 3.14 and 3.43.

¹⁴¹ Major S. Smith, Report of the Assistant Political Resident from Biddah, 20 July 1871. Ann. 9, Vol. 2, p. 18.

inhabitants of Doha. For example, during the 1880s there was unrest amongst the inhabitants of Doha, some of whom left the Doha enclave and the Al-Thani's authority and moved to Fuwairat in the north of the Qatar peninsula. British records of 1886-1887 noted:

"Dissensions have, during the past few years, been rife amongst the Arabs residing under the jurisdiction of Shaikh Jasim of El-Bida'a, and bodies of seceders first settled at El-Foweyrat on the Katr Coast, where they are to some extent under the protection of the Noeym tribe who maintain intimate friendly relations with the Chief of Bahrain."¹⁴²

93. Throughout their occupation of the Nejd from 1871 to 1915, the Ottomans themselves, in internal memoranda and correspondence at the highest level, acknowledged that they never exercised any effective control over the Qatar peninsula, apart from Doha and its immediate environs.¹⁴³

94. Even as late as 1917, while the Ottoman Empire was at war with Britain and still laying claim to the Nejd (including Qatar and Bahrain), an Ottoman internal report acknowledged that the Ottoman Empire had never exercised any authority over the Zubarah Region. The report claimed that the Qatar peninsula came under the Ottoman Empire during the 16th Century but admitted that it quickly drifted out of Ottoman control because of indifferent administration by the Ottomans:

"The issue of Qatar developed over centuries by the same processes as those which had determined the issue of Kuwait, namely indifference on

¹⁴² Persian Gulf Residency and Muscat Political Agency Report for 1888-1887, p. 7. Ann. 18, Vol. 2, p. 44.

¹⁴³ For example, see Projected Ottoman Council of Ministers decision concerning Qatar re negotiations with Britain, 11 March 1913, Ann. 37, Vol. 2, p. 118; Communications between Vali of Basra and Ottoman Minister of the Interior re Zubarah, 30 November 1911, Ann. 36, Vol. 2, p. 116; Report from province of Basra to Ottoman Ministry of the Interior, 25 September 1909, Ann. 35, Vol. 2, p. 113; Document from Ottoman Ambassador to London to Ottoman Council of Ministers 28 February 1913 and the Grand Vizier's observations [undated], Ann. 38, Vol. 2, p. 120; Telegram from acting Vali of Basra [to Grand Vizier] 8 March 1913, Ann. 39, Vol. 2, p. 122; Note from Ottoman Minister of the Interior [to Council of Ministers/Vizier] 11 December 1908, Ann. 33, Vol. 2, p. 110; Letter from Mutasarrif of Nejd [to Grand Vizier], 17 October 1891, Ann. 24, Vol. 2, p. 52.

the part of the Ottoman authorities, coupled with England's desire for control."¹⁴⁴

The report asserted that Midhat Pasha's 1871 expedition again brought the peninsula within the Ottoman Empire, but that his departure shortly thereafter allowed Britain to seize it indirectly.¹⁴⁵ The document noted:

"England's categorical language and its determination to prevent our mudirs [local administrators] from settling in their posts, by force if necessary, deterred the Imperial Government from resuming effective administration of the aforesaid peninsula."¹⁴⁶ (Emphasis added)

The report concluded its analysis by admitting that the Ottomans had no information of a time when the Ottomans exercised genuine control over Qatar and noted that their best information was the vague and unsubstantiated supposition that there had been no Ottoman administration over the coast of Qatar since the early 19th Century "at the least."¹⁴⁷

(ii) The Al-Thani understood that the Doha enclave was subject to the Ottoman protégé and Al-Khalifa pretender – Sheikh Nasir bin Mubarak

95. In 1874, Jasim bin Thani complained to the Ottomans that, despite everything, the Doha confederation remained subject to the effective exercise of Bahraini authority.¹⁴⁸ In response, the Ottomans sent Sheikh Nasir bin Mubarak Al-Khalifa, a pretender to the throne of Bahrain, to Doha to be their *agent provocateur* against the

¹⁴⁴ Ottoman Reports concerning Bahrain, Qatar, Nejd and Basra, 29 May 1917. Ann. 47, Vol. 2, p. 151.

¹⁴⁵ The Ottomans attributed Britain's motivation for its activities to Bahrain.

¹⁴⁶ Ottoman Reports concerning Bahrain, Qatar, Nejd and Basra, 29 May 1917. Ann. 47, Vol. 2, p. 151.

¹⁴⁷ *Ibid.*

¹⁴⁸ Letter from News Agent, Bahrain, to British Political Resident in Bushire, 14 October 1874. Ann. 11, Vol. 2, pp. 30-31.

Ruler of Bahrain.¹⁴⁹ Sheikh Nasir spent the next several decades unsuccessfully trying to expand ostensibly Ottoman (but really his own) interests in achieving ascendancy over Bahrain from his base in Doha. However, as noted elsewhere,¹⁵⁰ each of the six times he attempted to do so from the Zubarah Region, he and the Ottomans and Al-Thani were rebuffed by Britain and Bahrain.

96. Significantly, when Sheikh Nasir arrived in Doha, Jasim bin Thani announced publicly that the Al-Khalifa pretender would be the Governor and he, Jasim, his assistant.¹⁵¹ Thus the Al-Thani continued to acknowledge the Al-Khalifa authority.¹⁵² The matter was put forward in a very candid manner by Sheikh Nasir during a secret interview with British officials in 1881:

"Jasim in his own heart does not like that I should acquire independence and power and he has understood, the cause is this, that should I in the meantime obtain my object (he fears) he would have no escape from my clutches as you know Guttur and its environs were formerly under the administration of the Shaikhs of Bahrain, and they (the people) were regarded as subjects, but it is some time now that they have gone under the authority of the Ottoman Govt; and are now repentant of their

¹⁴⁹ Sheikh Nasir bin Mubarak had acquired Ottoman nationality and become an Ottoman protégé. He incited the Bani Hajir tribe's unsuccessful attack on the Naim tribe in 1873. He had petitioned the Ottoman Sultan for restoration of his family's rights in Bahrain, which the Porte duly took up with the British. He remained in Hasa until May 1874 when he was sent to Qatar. (J.A. Saldana, *The Persian Gulf Precip* (1986), Vol. IV (hereinafter Saldana), Chapter XVI, pp. 38-43. QM Ann. II.7, Vol. 4, pp. 56-61.)

¹⁵⁰ See BM Section 2.7.

¹⁵¹ Letter from the News Agent, Bahrain, to British Political Resident, 14 October 1874. Ann. 11, Vol. 2, pp. 30-31.

¹⁵² In Sheikh Jasim Al-Thani's will, written in 1891 with a supplement in 1904, he invokes blessing on three of his sons, Abdallah, Abd al-Rahman and Muhammad "les alliés de la famille Khalifa". This comes from a translation of Jasim's will published in A. Montigny-Kozłowska, "Le partage des biens d'un ancien dirigeant de Qatar" published in Gast, M, ed. *Hériter en Pays Musulman* (1987) pp. 43-54. Ann. 120, Vol. 2, pp. 383-396. Montigny-Kozłowska's comments also make it clear that at the time of his death in 1913, Al-Thani power was limited to Doha, which he ruled, and nearby Wakra, ruled by his son Abd al-Rahman.

conduct and are very desirous of escaping from and getting out of the authority of that Government."¹⁵³

97. Thus it was still the Al-Khalifa family, not the Al-Thani, that controlled the destiny of the Doha confederation. The Doha confederation effectively continued to be subject to one of the Al-Khalifa family branches, albeit through the Ottoman protégé Sheikh Nasir, and the Al-Thani publicly acknowledged this.

(iii) Bahrain's claim to rights in Zubarah was recognised by Britain

98. Qatar claims that Britain did not recognise Bahrain's rights in Zubarah.¹⁵⁴ However, the historical record shows that this was not the case. From 1871, the Ruler of Bahrain wanted to act against the Doha confederation and Sheikh Nasir in order to reinstitute their payment to Bahrain of tax and tribute, which had stopped with the arrival of the Ottomans. However, Britain did not want to be dragged into a war – even a proxy war – with the Ottomans. Therefore, Britain warned the Ruler of Bahrain that, in the light of the Ottoman involvement in Arabia in general and Doha in particular after 1871, Britain considered that it would not be bound by the terms of the 1861 Treaty to defend the Ruler if he antagonised the Ottomans. The British Political Resident reiterated this to the Ruler of Bahrain in 1874:

"I took the opportunity to repeat to you the advice you have so often received from the British Resident to keep clear of the feuds on the mainland, and especially to avoid giving offence to the Turkish Government.

Having reported the nature of this conversation to the Government of India, I am instructed by Government that if you should take any part in

¹⁵³ Note from British Political Resident of secret interview with Nasir bin Mubarrak at Guttur, 1881. Ann. 17, Vol. 2, pp. 41-43. It is clear why in 1893 Sheikh Jasim had little difficulty with the idea of having to pay tribute to the Rulers of Bahrain if he succeeded in breaking from the Ottomans, as described in paragraphs 148 and 164 of Bahrain's Memorial. The Al-Thani were caught between the Al-Khalifah Ruler of Bahrain (allied to Britain) and the Al-Khalifa Sheikh Nasir (protégé of the Ottomans).

¹⁵⁴ QM paras. 3.46-3.54, and 8.12-8.30.

complications on the mainland, the British Government will not guarantee you protection."¹⁵⁵ (Emphasis added.)

99. Britain advised the Ruler of Bahrain that "If such protection [under the 1861 Treaty] is to be accorded him, he must not be the aggressor or undertake measures ... considered inadvisable by the British Government".¹⁵⁶ He was to "abstain, as far as practicable, from interfering in complications on the mainland."¹⁵⁷ (Emphasis added.) However, this clearly did not amount to a prohibition. The Ruler of Bahrain clarified for the Resident that while he had been advised by Britain:

"to abstain from interference on the mainland; that he had carried out the wishes of Government in this respect, but that he had never been expressly forbidden to throw up connection with Zobarah."¹⁵⁸

100. At paragraphs 297-301 of its Memorial, Bahrain discussed Britain's review of the issue of Bahrain's sovereignty over the Zubarah Region. Contrary to the assertions in Qatar's Memorial, British officials acknowledged as late as 1937 that Britain had never decided that Bahrain did not have sovereignty over Zubarah or that Qatar did.¹⁵⁹

101. After the arrival of the Ottomans in the region in 1871, Britain wanted itself, not Bahrain, to take measures to ensure that the Ruler's enemies did not occupy the strategic site of Zubarah. As described in Chapter 2 of Bahrain's Memorial, Britain did protect Bahrain's interests in the Qatar peninsula and expressly based its actions on its protection of Bahrain's rights there.

¹⁵⁵ Letter from Lt. Col. E.C. Ross, British Political Resident to Sheikh Esau Bin Ali, Chief of Bahrein, 12 December 1874. QM Ann. III.30, Vol. 6, pp. 145-147.

¹⁵⁶ Letter of instructions to British Political Resident, September 1873. QM Ann. II.7, Vol. 4, p. 61.

¹⁵⁷ *Ibid.*

¹⁵⁸ Report from Officiating 2nd Assistant British Political Resident to British Political Resident 8 March 1875. Ann. 12, Vol. 2, pp. 32-34.

¹⁵⁹ Letter from Capt. Hickinbotham, British Political Agent, to Capt. Galloway, Secretary to British Political Resident, 16 September 1937. BM Ann. 159, Vol. 4, p. 732.

102. The Ottomans recorded that Britain resisted their efforts to exercise authority in the Zubarah Region specifically because of Bahrain's rights there. An Ottoman Foreign Ministry Report on Zubarah dated 3 May 1897 observed:

"England claims that Zubarah is under the control of Bahrain which it claims is under English protection, and England insists that the Ottoman State has no rights of sovereignty over it."¹⁶⁰ (Emphasis added.)

103. This clearly refutes the claim in Qatar's Memorial that Britain did not recognise Bahrain's rights in Zubarah.¹⁶¹

(iv) Britain and Bahrain did not recognise Ottoman or Al-Thani rights in Zubarah

104. Qatar's Memorial asserts that Ottoman and Al-Thani control over the entire Qatar peninsula was recognised by Britain and Bahrain.¹⁶² This is quite untrue. Sections 2.5 and 2.6 of Bahrain's Memorial show by reference to the extensive and unambiguous public record that neither Britain nor Bahrain recognised any such claim. To this public record is added the account, in Section 2.7 of Bahrain's Memorial, of the six occasions when Britain and Bahrain rebuffed the Ottoman Empire and the Doha confederation in their attempts to exercise authority over the Zubarah Region from 1874 to 1903.

105. British reports confirmed that in the 1880s discontented Doha inhabitants moved to the north of the Qatar peninsula to leave Al-Thani jurisdiction and settled there under the protection of the Bahraini-allied Naim.¹⁶³

¹⁶⁰ Ottoman Report on the Zubarah Affair, 3 May 1897. BM Ann. 63, Vol. 2, pp. 269-272.

¹⁶¹ For further discussion, see BM paras. 197-213.

¹⁶² QM Chapter 8.

¹⁶³ Persian Gulf Residency and Muscat Political Agency Report for 1886-1887, p. 7. Ann. 18, Vol. 2, p. 44.

106. Sheikh Jasim Al-Thani expressly recognised the fact that his authority was limited to the Doha enclave. In 1880, referring to Sheikh Nasir bin Mubarak, the pretender to the Al-Khalifa throne discussed in Section 2.2.H.(ii) above, Jasim bin Thani wrote to the British Political Resident that he had prevented Sheikh Nasir from going to Bahrain from "my territory" and added:

"It is his intention to pass [to Bahrain] from the Northern parts either from [Fuwairat] or from another place, and I have nothing to do with him or his cousins or the Northern countries, for they belong to the parts of Bahrain."¹⁶⁴ (Emphasis added.)

107. In 1893, Jasim bin Thani, seeking himself to leave the Doha enclave in order to escape from Ottoman jurisdiction, appealed to the British Political Resident for protection, and moreover asked the Ruler of Bahrain:

"for permission to reside in the northern part of Qatar within the latter's jurisdiction."¹⁶⁵

The British Political Resident reported that Jasim wanted a place on the Qatar coast under British protection other than Zubarah. Thus Jasim himself did not consider that his or the Ottomans' jurisdiction extended beyond Doha and at the same time also acknowledged that Zubarah could not be considered as his.

108. In 1888, Britain described what it considered as the area that comprised the Doha enclave:

"Her Majesty's Government have declined to admit the claim of Turkey to sovereignty over the El Katr Coast, while the Sultan uncompromisingly asserts his rights over that coast. The Sheikh of el Bidaa, on the eastern side of El Katr Peninsula, an independent Chief, not a party to the maritime truce, has allowed the Turks to maintain a small military post there since 1872 and Her Majesty's Government have never

¹⁶⁴ Letter from Sheikh Jasim Al-Thani to the British Political Resident, 24 November 1880. Ann. 15, Vol. 2, pp. 37-38.

¹⁶⁵ Saldana *op. cit.* p. 39. BM Ann. 70, Vol. 2, p. 327; QM Ann. II.7, Vol. 4, pp. 59-61.

protested against this assertion of Turkish supremacy on this portion of the El Katr Coast.

... that Her Majesty's Government do not consider the Porte is in effective occupation of the Arabian Coast beyond Katif, and that they adhere to the declaration made in 1883 that the claim of the Porte to the rights of sovereignty over the El Katr Coast is not admitted by Her Majesty's Government."¹⁶⁶

109. Qatar has also suggested that Britain was aware of the various attempts by the Ottomans to strengthen their toehold on the Qatar peninsula and yet did not interfere:

"The British did not seek to interfere with or prevent the establishment of a Turkish presence in Qatar from 1871 onwards, nor did they seek to interfere when Turkish or Qatari authorities sought to exercise control over Zubarah."¹⁶⁷

110. This assertion in Qatar's Memorial is not supported by reference to any evidence. The historical record flatly contradicts Qatar's assertion.

111. Ottoman records acknowledging that Britain had prevented the Ottoman Empire from exercising authority outside the Doha enclave – described above – are clear.¹⁶⁸ In addition to this there is the Ottoman report of Britain's and Bahrain's repudiation in 1895 of the latest unsuccessful Ottoman attempt to settle and administer the Zubarah Region. That Ottoman government report noted that Britain:

"does not recognise that the Ottoman State has any rights of control over these shores".¹⁶⁹

The point was driven home more dramatically in another Ottoman report from 1896:

"Zubarah, on the shores of the Persian Gulf ... was blasted by gunfire from the British fleet ..."¹⁷⁰

¹⁶⁶ Memo from India Office to Foreign Office, 2 November 1888. Ann. 23, Vol. 2, p. 50.

¹⁶⁷ QM para. 8.15. See also QM paras. 3.49 *et seq.*

¹⁶⁸ Paras. 93 and 94, above.

¹⁶⁹ Ottoman Report on Bahrain, 16 September 1895. Ann. 26, Vol. 2, p. 90.

Yet another Ottoman government report a year later observed:

"England claims that Zubarah is under the control of Bahrain which it claims is under English protection, and England insists that the Ottoman State has no rights of sovereignty over it."¹⁷¹

A report from the Ottoman Council of Ministers (Cabinet) in 1900 reviewed the history of Britain's rejection of Ottoman claims relating to Zubarah and concluded:

"According to our understanding of these declarations, the Ottoman State does not recognise England as having any legal rights and as a result of the communications that actually took place between them, as far as we know, England will not give up claims on Zubara and Odeid."¹⁷²
(Emphasis added)

A document of the Ottoman Council of Ministers (Cabinet) from 1913 notes:

"England is still opposed to the [Ottoman] administration [of Qatar] and has not recognised the sovereignty that the Ottoman State tried to establish in the Katar region. England relies on the guarantee given to the English Ambassador in Istanbul on December 10th 1871 ... that the Sublime Porte had no intention of inciting the independent tribes who lived on the Gulf of Basra's shores, or of retaining power and influence over them. Finally a stand had to be made against English threats to expel the officials and to attack those sent to Ujeyd, Vakra and Zubara. Furthermore the English warships blasted Zubarah with gunfire and completely destroyed it. Now the English insist even more that they do not confirm Ottoman rule on the shores south of the Ujeyr harbour, and they wish us to cut off connections with the Katar peninsula. Therefore it is vital to remove disagreements by putting an end to fruitless efforts to impose sovereignty in the Katar peninsula."¹⁷³ (Emphasis added.)

112. Thus the historical record shows that Bahrain, Britain, the Ottomans and the Al-Thani understood, at the relevant time, that the Ottomans and the Al-Thani had no rights

¹⁷⁰ Ottoman Report concerning Zubarah and Bahrain, 12 February 1896. Ann. 27, Vol. 2, p. 93.

¹⁷¹ Ottoman Report concerning the Zubarah affair, 3 May 1897. BM Ann. 63, Vol. 2, pp. 269-272.

¹⁷² Ottoman Report on Bahrain from the Council Chamber, 22 April 1900. Ann. 28, Vol. 2, pp. 96-97.

¹⁷³ Projected Ottoman decision concerning Katar, 11 March 1913. Ann. 40, Vol. 2, p. 125.

outside the Doha enclave, and in particular not in Zubarah. It is only now that Qatar wishes to alter history.

113. The record of Britain's responses to the Ottoman and Al-Thani attempts to expand their influence beyond the Doha enclave, described in Bahrain's Memorial at Section 2.7, shows that Britain was quite prepared to act against the Ottomans and the Al-Thani when they ventured beyond Doha, and did so in order to defend Bahrain's territory under the 1861 Treaty.

114. These are but samples taken from a mass of historical evidence refuting Qatar's allegations.

115. Evidence in Qatar's own Annexes contradicts its claim on this point. For example, paragraph 3.49 of Qatar's Memorial notes that Britain did not prevent the Ottomans from supplementing their guard post in Doha. However, Qatar omits to relate the remainder of the episode: when Britain found that the Ottomans were planning to appoint mudirs (local administrators) for Zubara and Udayd, Britain took the matter up with the Ottoman government in Constantinople and successfully prevented the appointments.¹⁷⁴

(v) 1896-1910: Fifteen critical years that are passed over without comment in Qatar's Memorial

116. It is significant that the discussion in Qatar's Memorial of the history of the region at this juncture fails to describe the period from 1895 up to the negotiations that led to the 1913 Anglo-Ottoman Convention. By leaving out more than 15 years, Qatar's Memorial omits significant events that are entirely inconsistent with Qatar's claim that

¹⁷⁴ Saldana, *op. cit.*, pp. 35-36. QM Ann. II.8, Vol. 4, pp. 221-222. See also BM Section 2.7. It is deliberately misleading to cut the story off at the point where Qatar's Memorial paragraph 3.49 does.

there was an independent, recognised political entity known as Qatar that controlled the Qatar peninsula.

117. From the early 1890s, when Sheikh Jasim bin Thani tried to obtain the protection of Bahrain and Britain and to flee the Ottomans and the Doha enclave,¹⁷⁵ internal Al-Thani family squabbles dissipated what little central authority existed in Doha. This was recognised by Britain, as is evidenced by the following:

- In 1900, part of the Al Bin Ali tribe which had joined the Doha confederation following the events of 1895, attacked a group of pearl fishers, thinking that they were responsible for the death of the Al Bin Ali chief.¹⁷⁶ Britain punished the responsible Al Bin Ali group without paying any heed to the fiction that the sanction should be carried out by, or even in the name of, the Al-Thani.
- Also in 1900, a group from the Beni Hajir tribe based in Doha and thus ostensibly under the "authority" of the Al-Thani, violated the maritime peace. Britain intervened in order to provide some sort of effective authority, given the absence of Ottoman administration. Again, British officials indicated no recognition of any Al-Thani authority.¹⁷⁷
- In 1903, the Ottomans proposed to establish their administration in Zubarah. Britain confronted the Ottomans, citing Bahrain's sovereignty over Zubarah, and the Ottomans backed down.¹⁷⁸

118. Britain was concerned by the vacuum of authority in Doha because, while the rest of the Arab Gulf littoral was subject to the maritime truce and was controlled by

¹⁷⁵ See BM paras. 146-155.

¹⁷⁶ Lorimer, *op. cit.*, Vol. II, p. 1508. QM Ann. 2.4, Vol. 3, p. 61.

¹⁷⁷ Lorimer, *op. cit.*, Vol. I, p. 834. Ann. 45, Vol. 2, p. 1405.

¹⁷⁸ BM paras. 183-186.

identifiable rulers who could be held responsible for the control of their subjects, there were no comparable rulers in that part of the Qatar peninsula around Doha which was under the nominal control of the Ottomans and the Al-Thani. This led Britain, from 1900, to consider setting up one of the Al-Thani brothers as ruler of the area and incorporating it within the Trucial system.¹⁷⁹ The internal debate in the British Government about whether to create a protectorate within the Qatar Peninsula using the Al-Thani was resolved in 1903 against the idea.¹⁸⁰ The Al-Thani clan were considered to be too weak even within the Doha enclave to merit Britain's support.

119. It was during this period that Britain considered various means to endorse and give effect to Bahrain's claim to the Zubarah Region as a means of controlling the peninsula. In 1902, the British Political Agent suggested that Bahrain should have Zubarah and leave the rest of the peninsula to the Al-Thani.¹⁸¹ He later suggested that Bahrain might formally send a representative to occupy Zubarah.¹⁸² In 1903, the British Political Resident, referring to the sixth and final unsuccessful attempt by the Ottomans to establish their authority in the Zubarah Region, observed:

"the occupation of Zobara [by the Ottoman Empire] would be viewed with the greatest concern by the Chief of Bahrein, who considers the place to be an appendage of his, and whose rights we are bound to maintain ..."¹⁸³ (Emphasis added.)

120. In 1905 Britain considered re-establishing Bahrain's sovereignty over the entire Qatar peninsula except Doha, noting that the Al-Thani controlled only the Doha

¹⁷⁹ BM paras. 151-155.

¹⁸⁰ BM paras. 154-155; BM Ann. 70, Vol. 2, pp. 340-341.

¹⁸¹ Letter from J.C. Gaskin, Assistant British Political Agent to Lt. Col. C.A. Kemball, British Political Resident, 22 March 1902. Ann. 29, Vol. 2, pp. 98-99.

¹⁸² Letter from J.C. Gaskin, Assistant British Political Agent to Lt. Col. C.A. Kemball, British Political Resident, 29 March 1902. Ann. 30, Vol. 2, pp. 100-102.

¹⁸³ Letter from Lt. Col. Kemball, British Political Resident, to Govt. of India, 23 March 1903. BM Annex 67, Vol. 2, p. 281.

enclave.¹⁸⁴ The idea of increasing the Bahraini population in Zubarah and forming an alliance between the Ruler of Bahrain and Sheikh Jasim bin Thani was also proposed.¹⁸⁵ It is clear from these documents that Britain was contemplating at the very least a formal entrenchment of the existing north/south division of the Qatar peninsula that has been described in Section 2.2.B above. In 1909 the Ottomans recognised that their lack of authority in the north of the Qatar peninsula was giving Bahrain free reign to strengthen its position there.¹⁸⁶

121. It was in this context of strengthening Bahrain's presence in Zubarah that Britain attempted to obtain Jasim bin Thani's recognition, in 1911, of a plan to increase in the number of Bahrainis living in the Zubarah Region.¹⁸⁷ Given the full description of the circumstances, one can see how inaccurate it is for Qatar's Memorial to invoke this event as demonstrating that Britain understood that Qatar had full and effective control over the Qatar peninsula.¹⁸⁸ Qatar failed to mention that the same Ottoman report cited in its Memorial recorded that a similar approach to Sheikh Jasim was made by Abu Dhabi, to the south and east of Doha.¹⁸⁹ Britain's attempt to entice Jasim bin Thani into agreeing to the *de jure* recognition of the *de facto* situation in the peninsula was part of concerted action by Britain to follow a policy that was described by British officials as:

¹⁸⁴ Memorandum from Major Cox to S.M. Fraser, British Political Resident, 16 July 1905. BM Ann. 71, Vol. 3, pp. 355-363.

¹⁸⁵ Memorandum from Capt. Prideaux, British Political Agent to the British Political Resident, 23 December 1905. Ann. 31, Vol. 2, pp. 103-105.

¹⁸⁶ Report from the Vilayet of Basra to Ottoman Ministry of the Interior, 25 September 1909. Ann. 35, Vol. 2, p. 113.

¹⁸⁷ Britain even tried to entice Sheikh Jasim Al-Thani with money. See QM para. 8.26.

¹⁸⁸ QM para. 8.26.

¹⁸⁹ QM Ann. III.56, Vol. 6, p. 266.

"devoted to contracting this Chiefship [Sheikh Jasim] to its narrowest possible limits."¹⁹⁰

122. In 1908, the Al Bu Aynayn tribesmen, living in the Wakra part of the Doha enclave,¹⁹¹ appealed unsuccessfully to the Ottomans for support against the excesses of the Al-Thani.¹⁹² Fed up with the Al-Thani, the Al Bu Aynayn removed themselves from Doha, first to Kuwait and then to Jubayl, where they came under Ibn Saud's protection. The Doha confederation was unravelling.

(vi) The negotiations over the unratified 1913 Anglo-Ottoman Convention

123. Qatar's Memorial claims that the unratified 1913 Anglo-Ottoman Convention "recognised" the autonomy of the Qatar peninsula under Al-Thani rule, "as in the past."¹⁹³ The historical record contradicts this assertion.

124. In 1911, Britain and the Ottoman Empire began negotiations to deal with their relations in Arabia in relation to a variety of linked issues – including the Baghdad railway, the geopolitics of the Gulf, customs dues increases – which had implications for the Qatar peninsula. At the end of 1913, the two Powers reached a provisional, unratified and partial agreement dealing with the Gulf, known as the Anglo-Ottoman Convention.¹⁹⁴ However, this document was overtaken by much more significant events almost before it was signed. Though it was never ratified and so had no legal effect, it is

¹⁹⁰ Undated memo forwarded from Major Cox, British Political Agent to British Political Resident included in memo from British Political Agent dated 16 July 1905. BM Ann. 71, Vol. 3, pp. 355-363.

¹⁹¹ Wakra was located a few miles south of Doha, and is today a suburb of it.

¹⁹² Administrative Report on the Persian Gulf Political Residency for April to December 1908, Calcutta, Superintendent Government Printing, India, 1909, p. 5. Ann. 34, Vol. 2, p. 111.

¹⁹³ QM paras. 3.57, 8.27-8.28.

¹⁹⁴ Qatar acknowledges the nature of the 1913 Convention: see QM para. 3.58.

noteworthy that Britain, from the outset in 1911, expressly protected the interests of the Ruler of Bahrain in the Qatar peninsula:

"[A]ny lasting settlement between the two Powers must provide for the definite renunciation by the Ottoman Government of Bahrain and adjacent islands and of the whole of the Peninsula of El Katr (including El Bidaa), where the Shaikh of Bahrain has important rights."¹⁹⁵

It merits noting that in 1913 the Ruler of Bahrain reminded Britain of his right to levy tribute from the tribes on the Qatar peninsula.¹⁹⁶

125. In contrast, the final text of the abortive Convention relating to the Qatar peninsula was the result of a last-minute political manoeuvre put forward on the spur of the moment by the Ottoman Minister to London in 1913. After having described the futility of continuing to insist on Ottoman claims relating to "El-Katar peninsula" and noting that the Ottoman persistence "greatly offends the English", the Ottoman Minister related that:

"I provided information that we could give up our claims in El-Katar with some conditions; these suggestions were my own ideas – e.g. that (Katar) should not be part of Bahrain, or be loyal to England or under its rule ..."¹⁹⁷ (Emphasis added.)

In other words, this was not a grounded policy decision, but a personal, eleventh-hour idea by the Ottoman Minister in London to enable the Ottomans to save face.

126. As indicated above, the draft never became a Convention and is neither legally relevant nor historically determinative.¹⁹⁸ The parties themselves recognised that it was

¹⁹⁵ See British memo 29 July 1911, as reproduced in J.C. Wilkinson, Arabian Frontiers: The Story of Britain's Boundary Drawing in the Desert, (1991), p. 90. Ann. 121, Vol. 2, pp. 397-409.

¹⁹⁶ BM para. 192.

¹⁹⁷ Note from Hakki Pasha, former Grand Vizier, at his post in London 25 February 1913. Ann. 37, Vol. 2, p. 118. His other suggestions were to recognise the Al-Thani role in Doha and give him an administrative role.

¹⁹⁸ See also BM paras. 27 and 192-194.

not a definitive document. The official report of the Ottoman Council of Ministers (Cabinet) on the 1913 Convention, written in February of 1914, noted:

"The written agreement on Basra and its environment, the agreement to abolish the English post-offices in Ottoman territory, to include the participation of the English government in discussions about securing agreement with other states to amend previously negotiated agreements over matters of justice – this agreement signed by Edward Grey instituting a temporary state of law, is to be submitted for the Sultan's approval.

The agreement and declaration of 29th July 1913, signed by Sir Edward Grey and Hakki Pasha [the Convention], concerning the temporary nature of the documents, which will, under the conditions of the diplomatic note, allow for amendments or reciprocal exchanges of ideas, have all been submitted to the General Council of Ministers for their consideration."¹⁹⁹ (Emphasis added.)

127. The 1913 Convention was not ratified because the complex set of interdependent proposals, of which the part relating to Bahrain and Qatar was but a small aspect, ultimately fell apart.²⁰⁰ Even as the ink was drying, the 1913 Convention had become largely irrelevant: the Wahhabis, under Ibn Saud, had ejected the Ottomans from Hasa on the eastern coast of Arabia; the Al-Thani clan was rapidly losing its control over Doha; and the Ruler of Bahrain remained in possession of the northern part of the Qatar peninsula and other territories supposedly given away under the 1913 Convention.²⁰¹ As the Saudi Memorial in the Buraimi Arbitration put it:

"[T]he non-ratification of the 1913 Convention became a permanent fact of history".²⁰²

¹⁹⁹ Official report of the Ottoman Council of Ministers, 1 February 1914. Ann. 43, Vol. 2, p. 131.

²⁰⁰ J.C. Wilkinson, *op. cit.*, p. 99. Ann. 121, Vol. 2, pp. 397-409.

²⁰¹ Memo from British Political Resident to Government of India, 30 June 1913. Ann. 41, Vol. 2, pp. 126-127.

²⁰² J.C. Wilkinson, *op. cit.*, p. 99. Ann. 121, Vol. 2, pp. 397-409. The argument in Qatar's Memorial at paragraph 3.58 for the validation of the boundary described in the 1913 text because of the existence of the ratified Anglo-Ottoman 1914 Treaty that defines the Aden territory is quite specious. It is indefensible to maintain that the by-line in Article 3 of the ratified (3 June 1914) Aden frontier had a "larger scope" than Article 11 of the 1913

I. Qatar claims falsely that the 1916 Treaty between Britain and the Chief of Doha included the entire Qatar peninsula

128. Even before the withdrawal of the Ottomans from Doha in 1915, the Doha confederation recognised that the greatest threat to its hope for an independent existence came from the activities in the south of the Qatar peninsula of the Wahhabis under Ibn Saud.²⁰³ At about this time, Sheikh Jasim bin Thani died. His successor, Sheikh Abdullah Al-Thani, signed the 1916 Treaty with Britain because he was desperate for protection from the Saudis, who were rapidly filling the vacuum in Arabia caused by the departure of the Ottomans.²⁰⁴

129. Qatar claims that the 1916 Treaty recognised the continuity of Al-Thani rule in Qatar from 1868.²⁰⁵ Qatar provides no authority for this assertion; it seems to be based on Qatar's analysis of the forged documents. Nothing in the text of the 1916 Treaty supports it. Only the preamble makes reference to 1868. In it, Abdullah Al-Thani acknowledges that the unilateral personal undertakings of his grandfather of 1868 "have developed [sic: devolved?] on me his successor in Qatar."²⁰⁶ There is no discussion in the Treaty of the quality or extent of Al-Thani authority either in 1868 or at any subsequent time. Qatar's Memorial implicitly recognises this elsewhere when it acknowledges that the territories of Sheikh Abdullah are not defined in the 1916 Treaty.²⁰⁷

Convention, whose ratification was continuously put off because of the immensely complicated linked issues on which this Convention was dependent.

²⁰³ Telegram from British Political Resident to Foreign Secretary of India, 31 August 1913. Ann. 42, Vol. 2, p. 128.

²⁰⁴ This threat was recognised by Britain. Letter from British Political Resident to Foreign Secretary of India, 15 September 1914. Ann. 44, Vol. 2, pp. 132-135.

²⁰⁵ QM para. 3.61.

²⁰⁶ BM Ann. 84, Vol. 3, p. 513.

²⁰⁷ QM paras. 5.43, 5.47, 8.28.

130. Qatar's Memorial claims that Britain recognised the entity called Qatar that emerged after the 1916 treaty between Britain and the Chief of Doha as including the entirety of the Qatar peninsula.²⁰⁸ Qatar offers no support for this assertion other than the forged documents and its own unsupported assertion that:

"Although the extent of Qatari territory was not explicitly defined in the Treaty, the British had obviously for many years prior to 1916 clearly recognised that Zubarah was part of Qatar."²⁰⁹

Qatar's wishful repetition of its assertion does not make its claim obvious.

131. As Bahrain described in its Memorial, and as acknowledged in Qatar's Memorial, the 1916 Treaty did not define what constituted the territory of the Sheikh of Qatar.²¹⁰ The area controlled by Sheikh Abdullah and the Doha confederation was very limited, being in reality nothing more than the enclave of the Doha confederation.

132. In fact, Qatar's present claim is contradicted by both of the parties to that Treaty. In March 1934, while discussing the 1916 Treaty with the British Political Resident, Sheikh Abdullah Al-Thani confirmed:

"The [1916] Treaty does not include the interior but only the coast ..."²¹¹

"The coast" refers to Doha and its environs; the text explicitly excludes "the interior". This view was shared by Britain. In 1934, during the ongoing debate within the British Government as to what constituted the territories of Sheikh Abdullah, it was observed:

²⁰⁸ QM paras. 3.61, 5.47, 8.28.

²⁰⁹ QM para. 8.28.

²¹⁰ See BM paras. 217-219. Qatar also asserts that the extent of Qatar's territory under the Treaty was somehow understood to be the same as it was under the Ottomans. Bahrain has demonstrated in Section 2.2.H above that the entity "Qatar" that existed under the Ottomans was recognised by Bahrain, Britain, the Ottomans and the Al-Thani as limited to the Doha enclave. Furthermore, the 1916 Treaty was personal and not hereditary. See BM para. 222.

²¹¹ Report of the British Political Resident, 12 March 1934 at p. 420. Ann. 122, Vol. 2, pp. 410-413.

"Presumably we do not want to add to the hinterland of Qatar large areas which the Sheikh may not be able to protect and which we should find it difficult to make secure for oil concessionaires."²¹²

Clearly both parties considered that the territory of Sheikh Abdullah was quite limited.

133. The historical conflict for control of the Qatar peninsula was between Bahrain (and the Naim tribe) in the north and the Saudis (the Wahhabis of the 19th Century) in the south. Qatar's Memorial, which partly acknowledges this when it discusses the Saudi claim to territories in the Qatar peninsula after the Ottoman departure from the region,²¹³ fails to relate the full story.

134. Britain was reluctant to protect Sheikh Abdullah by land. Such protection was not given in the 1916 Treaty. In 1921, Sheikh Abdullah solicited Britain's protection in the event of an attack from Ibn Saud. He was told that Britain:

"might perhaps if Doha is threatened and British subjects or property endangered send a ship there."²¹⁴

135. In 1922 the British Political Resident acknowledged the very real likelihood that "Qatar" would cease to exist:

"I think it would be a pity if Qatar disappeared as a separate entity; from our point of view it is convenient to have the rulers of the coastal districts on the coast, but I do not see any practical means of preventing peaceful penetration of the country by Ahkwan or Bin Saud's adherents."²¹⁵

²¹² India Office Memo, 11 January 1934. Ann. 66, Vol. 2, pp. 217-219. In 1947, the British Political Resident reported:

"In fact, as the Political Agent points out, the Shaikh of Qatar is a late arrival on the scene. He only consolidated his position on the mainland as recently as 1937" Letter from British Political Resident to Secretary of State for India, 18 January 1947. QM III.250, Vol. 8, p. 344

²¹³ QM para. 3.59.

²¹⁴ This threat was recognised by Britain. Letter from British Political Resident to Foreign Secretary of India, 13 May 1921. Ann. 48, Vol. 2, pp. 152-154.

²¹⁵ Despatch from Lt. Col. A.P. Trevor, British Political Resident to Denys de S. Bray, Foreign Secretary to the Government of India, 10 November 1922. Ann. 51, Vol. 2, pp. 162-166.

140. This view was evidently shared by Saudi Arabia. In relation to his discussions with the Saudi Foreign Minister in 1935, the responsible British official reported:

"In conversation, moreover, Sheikh Yusuf Yasim made some attempt to define the territories of the Sheykhdom of Qatar as having originally consisted of an enclave comprising Doha itself and a limited surrounding area known as Saffat."²²³

141. The limitation of Sheikh Abdullah's control over the Qatar peninsula to the town of Doha and its environs was reiterated by Saudi Arabia in 1934 in a communiqué sent to Britain:

"3. It is known among the Arab tribes that the confines (frontiers) of Qatar are the confines (frontiers) of the inhabited towns and villages and that at those points the confines (frontiers) of the countries generally known to form the part of [Saudi Arabia] end ...

4. All the tribes living between the coastal towns of Qatar and the coast of Oman and the Hadhremaut belong to the Saudi Arab Kingdom, are entirely submissive to the laws of the country, pay *Zakât* [religious tax], and are obedient to the calls of the Government in the time of war (Jihâd) etc ..."²²⁴

142. In 1932, British officials contemplated the territory of Sheikh Abdullah, which Britain should protect, was limited to the town of Doha, or perhaps along its coast.²²⁵

143. Sheikh Abdullah's lack of control over the Qatar peninsula was forcefully demonstrated in 1933 when he was tempted by Britain to ignore his dependence on Saudi Arabia and give an oil concession to a British company. Sheikh Abdullah was promptly summoned to Riyadh and reprimanded by Saudi Arabia. Sheikh Abdullah's limited role as ruler of Doha and its environs was made explicit by King Ibn Saud, who

²²³ Despatch from A.S. Calvert to Sir S. Hoare, 10 September 1935. Ann. 69, Vol. 2, p. 228.

²²⁴ Foreign Minister of Saudi Arabia to British Foreign Office 20 June 1934. Ann. 68, Vol. 2, pp. 225-227.

²²⁵ Letter from the British Political Resident to the Foreign Secretary of India, 7 June 1932. Ann. 56, Vol. 2, pp. 192-196.

was angered that his control over oil concessions in territories he considered his was being questioned by Sheikh Abdullah.²²⁶

144. Sheikh Abdullah himself acknowledged the limited area under his control. In 1933, the British Political Agent reported to the British Political Resident that Bahrain continued to make claims to "areas on the Qatar coast". He continued:

"That these claims are not regarded locally as dead and gone is shown by the fact that I have heard mutterings that the explorers of the Anglo-Persian Oil Company Limited in Qatar have examined places to which the Ruler of Qatar had no right to allow them to go, and which people from Bahrain frequent to this day as a summer resort; indeed, it is said that as late as last year (1932) the Ruler of Qatar admitted in public that certain areas on the Qatar coast pertain to Bahrain."²²⁷ (Emphasis added.)

This reported admission by Sheikh Abdullah is given further credence by a British report in 1937:

"It seems fairly evident that the Ruler's desire to protect the interests of the inhabitants on the east coast is due to the fact that he owes his position as Ruler to their support in the past whereas the Bedawin who roam the western areas have hardly recognised his control, favoured the Ruler of Bahrain by whom many were subsidised and by their migrations into Saudi Arabia are susceptible to outside influences."²²⁸

145. Contrary to the assertion in Qatar's Memorial, Britain, Sheikh Abdullah of Qatar and the Saudis shared the same view. In 1934, the British Cabinet was considering whether to offer protection to Sheikh Abdullah in exchange for his granting an oil concession to a British company (see further Section 2.3.G below). A Foreign Office Memorandum prepared in that context noted:

²²⁶ Letter from C.S. Burnett to the British Political Resident, 28 November 1933. Ann. 65, Vol. 2, p. 216.

²²⁷ Letter from the British Political Agent to the British Political Resident, 29 May 1933. Ann. 59, Vol. 2, pp. 203-206.

²²⁸ British Report 1937. Ann. 122, Vol. 2, pp. 410-413.

"The only dangers against which the Sheikh might need to be protected would come from either (a) Ibn Saud or (b) the tribes of the hinterland."²²⁹

The Memorandum discussed whether Sheikh Abdullah would be able to protect himself in such an eventuality and concluded:

"This would probably in any case be impossible, since our accounts of the Sheikh are that he is little more than a large merchant and his territory is very sparsely inhabited by tribesmen over whom he appears to exercise a very loose control."²³⁰

146. Bahrain emphasises that this Memorandum was written in 1934.

147. As late as 12 April 1937, the British Political Agent noted:

"I told the Resident that I thought that Bahrain had a real claim to Zubarah as Shaikh Isa's orders certainly used to be obeyed and the place is inhabited largely by persons from Hidd and from Rifa [both towns in the main Bahrain Island] and no Qatar customs are taken. I explained that the Zubarah area was a large semi-circular enclave with towers around it ... I finally begged the Resident not to suggest any course to Government until he had had an opportunity of finding out the Shaikh's attitude in the matter ..."²³¹ (Emphasis added.)

148. In a telegram dated 30 March 1937, the British Political Agent confirmed that:

- (a) in addition to the Naim, other important Bahraini families lived in the Zubarah Region;
- (b) those families made their living from fishing (with boats and fish traps);
- (c) the Ruler of Bahrain sent orders if the occasion arose to people who lived there (the telegram refers to the practice of the previous Ruler of Bahrain, who died in 1932, in that regard by stating that he "certainly used to do so"); and

²²⁹ Foreign Office memorandum, 21 February 1934. Ann. 67, Vol. 2, pp. 220-224, at p. 221.

²³⁰ Foreign Office memorandum, 21 February 1934. Ann. 67, Vol. 2, pp. 220-224, at p. 222.

²³¹ Note of British Political Agent, 12 April 1937. BM Ann. 114, Vol. 3, p. 634.

(d) no Qatari customs taxes were levied in the Zubarah Region.²³²

149. Even after the 1937 Al-Thani attack on Zubarah, British officials contemplated that Bahrain would prove its claim to the Zubarah Region.²³³

150. In the light of this history, Qatar's claim that the 1916 Treaty between Britain and Sheikh Abdullah created a State of Qatar that included the entire Qatar peninsula is quite unsustainable.

J. Qatar's Memorial offers no post-Ottoman evidence of Al-Thani activities in Zubarah until shortly before the 1937 attack

151. Qatar's Memorial presents no evidence of any Al-Thani activity in, let alone any attempt by the Al-Thani to exercise authority over, the Zubarah Region during the period following the departure of the Ottomans from Doha in 1915 until March 1937.

152. In contrast, Chapter 2 of Bahrain's Memorial and this section of the Counter-Memorial demonstrate the continuous exercise of Bahrain's sovereignty over the Zubarah Region.

K. Qatar's attack on the Zubarah Region in 1937 displaced Bahrain

153. Bahrain's Memorial has already described the details and effects of the Al-Thani attack on the Naim tribe and the Zubarah Region in 1937.²³⁴ It was only at that point that the Al-Thani physically displaced – but did not replace the authority of – the Al-Khalifa in the Zubarah Region.

²³² Telegram from Lt. Col. Loch, British Political Agent, to Lt. Col. Fowle, British Political Resident, 30 March 1937. BM Ann. 113, Vol. 3, p. 633.

²³³ BM para. 252.

²³⁴ See BM Sections 2.13-2.14.

L. The evidence of Bahrain's sovereignty over the Zubarah Region is not fundamentally disturbed by Qatar's arguments

154. Bahrain's Memorial demonstrated Bahrain's sovereignty over the Zubarah Region. The fanciful account of the history of the Qatar peninsula contained in Qatar's Memorial has been revealed to be far removed from the truth. Qatar's Memorial has recreated the history of the Qatar peninsula as it would have liked it to be, rather than as it actually was. Bahrain's demonstration of its sovereignty over the Zubarah Region is not disturbed. The history of the peninsula, as evidenced by records in the British archives, the Ottoman archives, and reliable scholarly works, is one of failure by the Al-Thani to exercise any control outside of Doha and its hinterland until well into the 20th Century. The record confirms the presence in the Zubarah Region of the Naim tribe, loyal to the Al-Khalifa, from the Al-Khalifa's founding of Zubarah in the 1760s until the Al-Thani attack of 1937.²³⁵ It also confirms the repeated and self-acknowledged failure of the Ottomans to establish any effective authority over the Qatar peninsula outside Doha and the consistent recognition by Britain of the reality and authority of Bahrain's rights over the Zubarah Region. Finally, the historical record confirms that a political entity named "Qatar" did not emerge until well into the 20th Century and that no such entity ever maintained control over the entire peninsula until after 1937.

155. Qatar's arguments, where not evidenced by fraudulent, misleadingly presented or mistranslated documents, are purportedly evidenced by selected citations taken out of context, that conveniently turn blind eyes to historical facts contradicting them.

156. Bahrain has submitted examples of the abundant evidence from historical records showing the integration of the Naim into the political economy of Bahrain.

²³⁵ The details of the dominant Al-Jabr branch of the Naim are contained in BM Chapter 2.

157. The arguments Qatar presents in its Memorial cannot withstand examination, nor do they disturb the evidence of the genuine historical record, described in Bahrain's Memorial and this Counter-Memorial. The latter records clearly show the continuity of Bahraini sovereignty over the Zubarah Region from the 18th Century.

SECTION 2.3 The Continuity of Bahrain's sovereignty over the Hawar Islands from the 18th Century to the present day

A. Introduction

158. Chapter 3 of Bahrain's Memorial comprehensively detailed the uninterrupted sovereignty exercised by Bahrain over the Hawar Islands from the 18th Century until the present day. Bahrain's evidence demonstrated notably:

- (i) the exercise of sovereign authority in the Hawar Islands by or on behalf of the Ruler of Bahrain;
- (ii) the recognition of Bahrain's sovereignty by the inhabitants of the islands; and
- (iii) the absence of any competing exercise of authority by Qatar.

159. To avoid repetition, Bahrain recalls here the principal themes developed in its Memorial with respect to the Hawar Islands:

- The historical genesis of Bahrain's title to the Hawar Islands lies in the original dominions of Greater Bahrain (the territories in the Gulf of Bahrain and its littoral, including the Qatar peninsula; see Section 2.2.A). The Hawar Islands' connection with Bahrain was recognised in antiquity and pre-dates the presence of the Al-Khalifa dynasty in the region.²³⁶

²³⁶ Arab historians from antiquity have included the Hawar Islands within the territories of Bahrain: See, for example, Al Emir Al Hafiz Ibn Makola, in Al Ikmal Vol. 1 p. 99 (475 H/ 1082 AD), Ann. 1, Vol. 2, p. 2; Sam'ani, in Al Ansab Folio 180/Manuscript (562 H/ 1166 AD), Ann. 2, Vol. 2, p. 4; Yaqoot al Hamawi, in M'ojam al Buldan Vol. 1, p. 315 (622 H/ 1228 AD), Ann. 3, Vol. 2, p. 6.

- In the early 19th Century, a branch of the Dowasir tribe settled in the Hawar Islands after having sought and obtained permission to do so from an official of the Ruler of Bahrain. In 1845, the same branch of the Dowasir tribe was granted permission from the Ruler of Bahrain to settle on the main island of Bahrain. The Bahrain Dowasir have maintained their loyalty to the Ruler of Bahrain to the present day, and have lived in Bahrain throughout this time except for a brief period of three and a half years in the mid-1920s.²³⁷
- The Hawar Islands were occupied by the Bahrain Dowasir and also by non-Dowasir Bahrainis.
- The traditional occupations of the Hawar Islanders were fishing, pearl-diving, some animal husbandry and gypsum extraction. There was regular traffic and commerce between the Hawar Islands and the main island of Bahrain and Muharraq Island. There is no evidence of any such commercial activities between the Hawar Islands and the Qatar peninsula.
- Records dating from the first decade of the 20th Century onwards abundantly testify to Bahrain's administration of the Hawar Islands. They include records of court cases relating to the Hawar Islands, police activities, and commonplace government directives. No such records exist evidencing Qatar's acts of administration in the Islands.
- Former residents of the Hawar Islands are still alive and have testified, individually, as to their lives there. Their statements²³⁸ consistently describe their fellow-islanders, their former homes and fish traps, their activities and livelihoods, their exclusive connection to Bahrain and its Ruler, the uninhabited nature of the Qatar peninsula opposite the Hawar Islands, and the absence of visitors to the islands from the Qatar peninsula.
- The record of oil concession negotiations demonstrates that the Hawar Islands were considered by Bahrain, Britain and the oil companies – including the Qatar concessionaire – to be included in the territories of Bahrain. Specifically, in 1936, Britain recognised Bahrain's sovereignty over the Hawar Islands. Thereafter, all concession negotiations with the Ruler of Bahrain included the Islands within the Ruler's territories.
- In 1938-1939, Britain conducted an arbitration between Bahrain and Qatar to determine sovereignty over the Hawar Islands. Bahrain submitted evidence of its historical exercise of sovereignty over the Hawar Islands. Qatar did not submit any evidence of its sovereignty, but essentially relied on an argument of

²³⁷ From approximately 1923-1927, many of the Bahrain Dowasir absented themselves from Bahrain (including the Hawar Islands) during a dispute over taxation and traditional privileges. When they returned, they resumed their traditional living patterns, including their occupation of the Hawar Islands.

²³⁸ See BM Ann. 313-316, Vol. 6, pp. 1363-1413.

proximity. On the basis of Bahrain's uncontroverted evidence, Britain determined that the islands – including Janan Island – belonged to Bahrain.

- On the Hawar Islands there can still be found ruins of two villages, several cemeteries (including a children's cemetery), a mosque, fish traps, water cisterns, a police fort which has been for the past half century and is today manned by Bahraini officers, and a palace built by the Ruler of Bahrain in the 1940s. Modern facilities include water purification systems, paved roads, pleasure craft docking facilities, two beach resorts and a three-star hotel, and a twice-daily shuttle-boat from the main island of Bahrain to Jazirat Hawar (the largest of the Hawar Islands). The Crown Prince of Bahrain has built a new residence there. The Hawar Islands are integrated into the Bahraini telephone system, including public telephones in both the northern and central parts of Jazirat Hawar. The Bahrain Defence Force have important defensive installations on Jazirat Hawar.
- At the time of Qatar's first claim to the islands in 1939, it would have been impossible to deny that Bahrain exercised authority over the islands. Qatar has never once done so.

160. In stark contrast to Bahrain's Memorial, which is based entirely on authentic documents that are a matter of public record, virtually all of the evidence submitted in Qatar's Memorial in support of its claim to the Hawar Islands is fraudulent. As Bahrain has indicated, it will ignore the substance of these forged documents and the arguments which they support.

161. Qatar has acknowledged that:

"During the latter part of the 19th century, Bahrain from time to time advanced vague pretensions to various islands (including ... the Hawar Islands) ..."²³⁹

This admission – the pejorative adjective "vague" notwithstanding – speaks for itself, since Qatar can point to authentic evidence of no such assertions by Qatar.

²³⁹ QM para. 5.8.

B. Qatar's claim that the Hawar Islands are geographically proximate to the Qatar peninsula is correct but irrelevant

162. Qatar's Memorial asserts that the Hawar Islands are situated close to and fit the general shape of the Qatar coast,²⁴⁰ and that the geology of the Hawar Islands is that of the Qatar peninsula.²⁴¹

163. Bahrain does not contest the fact of the physical location or shape of the Hawar Islands. Bahrain sees no need to comment on the geology of the Qatar peninsula. Bahrain has described in its Memorial the legal irrelevance of such facts to the determination of the issues in the case at hand.²⁴² There are numerous examples of States that exercise sovereignty over islands that are closer to another State's territory than their own.²⁴³

164. Geographical proximity is irrelevant to the facts of human geography.²⁴⁴ The human geography of the region has traditionally reflected an integrated socio-economic unit in the Gulf of Bahrain and its littoral including the main island of Bahrain, the Hawar group of islands, the other Bahraini maritime features and the Zubarah Region, with Doha an isolated enclave on the east coast of the Qatar peninsula.²⁴⁵

²⁴⁰ QM para. 4.2.

²⁴¹ QM para. 4.6.

²⁴² See BM Section 4.3.

²⁴³ For example: The British Channel Islands lie close to the coast of France. France's St. Pierre and Miquelon Islands are close to the coast of Canada. Greece exercises sovereignty of the Aegean Islands, many of which are close to continental Turkey. The Netherland Antilles lie off the coast of Venezuela. The Nicobar Islands of India are situated close to the shores of Sumatra, Indonesia. The Danish islands of Bornholm and Zealand are closer to Sweden than to continental Denmark. St. Martin's Island, belonging to Bangladesh, is in fact located off the coast of Burma. The Malawian islands of Chisamula and Likoma are close to the Mozambique shore of Lake Malawi. The Canary Islands of Spain lie off the west coast of Morocco.

²⁴⁴ QM para. 6.218.

²⁴⁵ See further Sections 2.2.A and 2.2.B.

165. While Bahrain maintains that geographical proximity is irrelevant to the case at hand, one of Qatar's subtler distortions requires clarification. Several maps in Qatar's Memorial purport to show that, at high tide, the southern tail of Jazirat Hawar (the largest of the Hawar Islands) is 1 kilometre from the coast of the Qatar peninsula.²⁴⁶ This is not the case. The depiction in the Qatar maps is inaccurate and misleading. The tail of Jazirat Hawar – which at any rate is a long narrow spit of sand no more than a few metres wide – does not come nearly so close to the Qatar peninsula at high tide as Qatar misleadingly depicts. An accurate depiction of Jazirat Hawar and its relationship to the Qatar peninsula can be found in the maps in Volume 7 of Bahrain's Memorial.

166. In the same section, Qatar's Memorial hypothesises that, if world sea-levels remain constant, the Hawar Islands might be physically reunited with the Qatar peninsula over a period of centuries.²⁴⁷ Such conjecture is highly speculative and too temporally remote to merit consideration in the present case. The waters between the Hawar Islands and the other islands of Bahrain are only a few metres deep; if anything, the Hawar Islands are more likely to be joined to the populous main island of Bahrain than to the empty desert of the west coast of Qatar.

C. Qatar has not produced any authentic evidence of exercise of authority in the Hawar Islands

167. Qatar's Memorial contains no authentic evidence that it ever exercised authority in the Hawar Islands.²⁴⁸ Bahrain will not address the forged evidence that Qatar adduced.

²⁴⁶ For example, see QM map No. 5 between pages 50 and 51 of the QM.

²⁴⁷ QM para. 4.6.

²⁴⁸ Qatar's Memorial contends that one of the Rulers of Qatar visited the Hawar Islands. (QM para. 6.194.) The evidence cited for this claim is the unsubstantiated assertion in the Qatar counter-claim of 30 March 1939 that this was the case. Qatar's Memorial also makes reference to "other evidence" – supposed witness statements submitted by Qatar in 1939 in one handwriting with no signatures or thumbprints (QM para. 6.200). Qatar acknowledges that this "was not as

168. Bahrain's evidence in Chapters 1 and 3 of its Memorial and in this Section of the Counter-Memorial is authentic and verifiable, from the public record. Moreover, it is consistent with the evidence presented by Bahrain during the 1938-1939 arbitration.

D. Qatar claims falsely that the Ottoman Empire, Britain, Bahrain and neighbouring States recognised the Hawar Islands as part of the territories controlled by the Doha confederation or Qatar

169. Qatar's claim that the Hawar Islands were recognised as being part of the territories controlled by the Doha confederation or the Al-Thani does not withstand scrutiny. Most of Qatar's support for this assertion are the 81 forged documents, which merit no consideration by the Court and will not be addressed by Bahrain.

170. Qatar makes reference to two British sources²⁴⁹ that refer to Bahrain as being a collection of islands in the middle of the Gulf of Bahrain (*i.e.*, implying that they did not include other territory such as islands on the littoral of the Gulf of Bahrain). Both were geographical and explicitly not political. Nonetheless, on that basis, and on the basis of other purely geographical descriptions of the Qatar peninsula, Qatar claims that the Hawar Islands were deemed by Britain not to be a part of the territory of the State of Bahrain.²⁵⁰ However, the British sources invoked do not support Qatar's argument.²⁵¹

compelling as it might otherwise have been." Britain dismissed this "evidence" as unsubstantiated assertions that merited – and were given – no credence in 1939. Their weight has not increased with time.

²⁴⁹ The Persian Gulf Pilot 12th Edition and Lorimer's Gazetteer.

²⁵⁰ QM paras. 5.1 and 5.75, 5.38, 5.44.

²⁵¹ Furthermore, Qatar fails to relate that some of these sources in fact recognise *inter alia* Bahrain's claim to sovereignty in the Qatar peninsula. (See also Lorimer, *op. cit.*, pp. 798-800. Ann. 45, Vol. 2, p. 136-141.) For example, Qatar's Memorial quotes incompletely from Lorimer, *op. cit.*:

"The present Shaikhdome of Bahrain consists of the archipelago formed by the Bahrain, Muharraq, Umm Na'asan, Sitrah and Nabi Salih islands and by a number of lesser islets and rocks which are enumerated in the articles upon the islands: taken all together these form a compact group almost in the middle of the gulf which divides the promontory of Qatar from the coast of Qatif." (QM para. 5.38.)

171. Qatar also refers to a survey of the Gulf conducted by the British Admiralty in 1915. Qatar claims that the survey included the Hawar Islands (with Janan) in the territory of Qatar.²⁵² This is incorrect and misleading. The British Admiralty survey was yet another exercise devoted exclusively to geographical description. The section relied on by Qatar is entitled "EL-QATAR Physical Character", the relevant part of which reads:

"An island, *Jezirah Hawar*, lies 5 miles W. of *Ras Abruruk* on the W. coast, with which it is roughly parallel; it is about 10 miles long, and has no permanent population, but the *Dawasir* of *Zallaq* in *Bahrein* have houses used as shooting-boxes in winter, and a cistern for rain-water. The islets *Rubadh* and *Janan* lie to N. and S. of *Hawar*, those of *Ajirah* and *Suwad* in the channel between it and the mainland."²⁵³

This description makes no reference to the Hawar Islands as being part of the territory of Qatar as a political entity, as Qatar's Memorial implies. Indeed, the opposite conclusion

The full quotation is:

"Extent and importance.- The present Shaikhdom of Bahrain consists of the archipelago formed by the Bahrain, Muharraq, Umm Na'asan, Sitrah and Nabi Salih islands and by a number of lesser islets and rocks which are enumerated in the articles upon the islands: taken all together these form a compact group almost in the middle of the gulf which divides the promontory of Qatar from the coast of Qatif and which, as it has no recognised name, may appropriately be styled the Gulf of Bahrain. Connected with the sovereignty of Bahrain, or possibly appertaining to the Shaikh as hereditary personal property, are certain ill-defined rights upon the mainland of Qatar, at present (1905) under discussion. Whatever the nature or extent of these rights, our attention will be confined, in the present article, to the undisputed insular possessions of the Shaikh." (From the context of this section of the document, this refers to the main islands of Bahrain. Lorimer, *op. cit.*, p. 234. QM Ann. II.3, Vol. 3, p. 88.)

Obviously, this quotation supports Bahrain's claim to the Zubarah Region. It also demonstrates that Bahrain was recognised to have, at the very least, claims to territory beyond the named islands. However, it confirms that Lorimer himself acknowledged that his description of the territories of Bahrain was not exhaustive, despite the fact that Qatar claims that it was. Significantly, Qatar's Memorial – correctly – acknowledges Lorimer to be a "geographical dictionary." (QM para. 5.38.) Lorimer does not purport to identify the sovereign title to the territories surveyed.

²⁵² QM para. 5.44.

²⁵³ A Collection of First World War Military Handbooks of Arabia 1913-1917, Vol. IV, A Handbook of Arabia, Vol. I, General, 1916, Archive Editions, (1988), p. 326. QM Ann. III.296, Vol. 8, p. 485.

should be reached by virtue of the reference to the Bahrain Dowasir's occupation of the islands. This reference can also be found in one of the documents cited by Qatar to support its discussion of the proximity of the Hawar Islands to the Qatar peninsula. A Handbook of Arabia, prepared by the War Staff Intelligence Division of the British Admiralty in May 1916, makes the observation that:

"the Dawasir of Zallaq in Bahrain have houses used as shooting boxes in winter, and a cistern for rain-water."²⁵⁴

172. Even if Qatar's distortion of the record were correct, geographical descriptions of this sort do not address the issue of sovereignty. They no more signify that Bahrain does not have sovereignty over the Hawar Islands than a description of France as a country in Europe would imply that it did not have sovereignty over the islands of St. Pierre and Miquelon, off the coast of Canada.²⁵⁵

173. Numerous references from the 19th and 20th centuries do confirm that the Hawar islands belonged – politically – to Bahrain. They are cited in Bahrain's Memorial and this Section of the Counter-Memorial. In stark contrast, there is not a single genuine document that describes the Hawar Islands as belonging politically to the Al-Thani or a State of Qatar, or even to "Qatar."²⁵⁶

174. Qatar's Memorial discusses the 1909 Ottoman claim to Zakhnuniya Island at paragraphs 5.39-5.40 in support of its allegation that the Ruler of Bahrain did not

²⁵⁴ QM para. 6.218.

²⁵⁵ Qatar omits to note that Lorimer describes the Hawar Islands as follows:

"[Jazirat Hawar is about] 10 miles long, north and south, and roughly parallel to the Qatar coast. There are no wells but there is a cistern to hold rainwater built by the Dawasir of Zellaq in Bahrain who have houses at two places on the island and use them in winter as shooting boxes." (Emphasis added.) See QM Ann. III.296, Vol. 8, p. 485.

²⁵⁶ This is entirely consistent with – and indeed reflects – the fact that the territory controlled by the Al-Thani was restricted to the area around Doha on the east coast of the Qatar peninsula until the late 1930s, as discussed in Sections 2.2.H and 2.2.I above.

consider that the Hawar Islands belonged to him. Qatar relies for its analysis on a British report (also cited in Bahrain's Memorial at paragraph 426-427) from March 1909. The extracts from this report quoted by Qatar are:

"The facts are that Dowasir of Budaiya and Zellaq on the north-west coast of Bahrain are in the habit of every winter partially migrating to Zakhnuniya and Hawar Islands for fishing (sharks as well as edible fish) and hawking. A Dosiri is said to have built the Zakhnuniya fort many decades ago, and Shaikh Ali bin Khalifa (Esa's father) rebuilt the fort during the reign of his brother Muhammad whom we deposed. Since then, the Dowasir have once again repaired the fort, but now it is in ruin and only the four unroofed bastions are standing."²⁵⁷

and:

"If Shaikh Esa is willing to claim sovereignty over Zakhnuniya our position will be fairly plain sailing ... but if Shaikh Esa doesn't want or dare assert his sovereignty over Hawar we shall be in rather a quandary. However, I hope next week to be able to give a satisfactory report about his attitude." (Footnotes omitted.)

However, these extracts quoted are taken from a four page report and, presented in this manner, are misleading in their incompleteness. Qatar fails to mention that the report clearly shows that:

- Britain acknowledged that the Bahrain Dowasir occupied the Hawar Islands and that they recognised the authority of the Ruler of Bahrain;
- Britain thus considered that the Hawar Islands belonged to Bahrain;
- there was no discussion by any of the three parties (Bahrain, Britain, and the Ottomans) of a "Qatari" or an Al-Thani presence on the west coast of the Qatar peninsula or the Hawar Islands during the incident;
- the Ottoman Empire never made a claim to the Hawar Islands despite the islands' open occupation by the Bahrain Dowasir;
- Britain noted that the Dowasir "are in the habit of every winter partially migrating" to the Hawar Islands.

²⁵⁷ QM paras. 5.39 and 5.40.

175. Furthermore, Qatar's inference from the report – that the Ruler of Bahrain could not have claimed the Hawar Islands – is inconsistent with the information contained therein. The British report expresses Britain's concern that if the Ruler of Bahrain declined to assert his sovereignty over the Hawar Islands, then difficulties would arise. Shortly thereafter, the Ottomans backed down and withdrew their claim. The crisis was defused to Bahrain's advantage and no difficulties arose. Qatar's Memorial concludes from this alone that "obviously" the Ruler of Bahrain refrained from asserting a claim to the Hawar Islands. Qatar provides no evidence or explanation for this unexplained and inexplicable conjecture. If anything could be extracted from these events, it would be that the Ruler of Bahrain did make such a claim, because the result feared by Britain if he did not – that difficulties would arise – failed to materialise.

176. Bahrain stands by its analysis of the Zakhnuniya incident, which is based on authentic documents rather than groundless and implausible speculation.²⁵⁸

177. Qatar invokes the unratified 1913 Anglo-Ottoman Convention (discussed in Section 2.2 above) to support its proposition that the Hawar Islands were recognised as belonging to a political entity called Qatar,²⁵⁹ notwithstanding the fact that Qatar's Memorial acknowledges that the territorial limits of Bahrain and Qatar were not defined with precision in this unratified Convention. Qatar argues that because three islands off the east coast of the Arabian peninsula were specifically mentioned in the Convention, but the Hawar Islands were not, the latter were therefore somehow implicitly understood to belong to Qatar.²⁶⁰ This argument is not supported by any evidence or analysis other than Qatar's conjecture that:

²⁵⁸ BM paras. 426–429.

²⁵⁹ QM paras. 3.57, 5.43 and 5.47.

²⁶⁰ QM para. 3.57.

"[i]f they had been considered as appertaining to Bahrain, their location so close to Qatar would surely have required express confirmation of this fact".²⁶¹

Qatar omits to mention that none of the islands of Bahrain was mentioned in the Convention other than the three islands that lie off the Arabian coast, described above. Bahrain was described in the document only as: "the Bahrein islands."²⁶² Thus Qatar's conjecture on this point collapses.

178. At another point, Qatar's Memorial also declares, without any evidence:

"As at the time of signing the Anglo-Ottoman Convention of 1913, no need was felt when signing the British-Qatar Treaty of 1916 to define Qatar territory or to refer specifically to Hawar or Janan islands as the British and Qatar were clear about the fact that the Hawar islands were part of Qatar."²⁶³

Qatar offers no support for this proposition. It is manifestly contrary to the historical record. It contradicts the evidence from the Zakhnuniya incident, when Britain recognised the Hawar Islands as part of Bahrain, and is supported only in the forged documents, not discussed here.²⁶⁴ Qatar's claim also founders on the established historical fact, discussed in Section 2.2.I above, that at the time of the signing of the 1916 Treaty the territory of the Al-Thani was restricted to the Doha enclave on the east coast of Qatar (a fact which was recognised publicly by Sheikh Abdullah Al-Thani and Britain even in the 1930s).

²⁶¹ QM para. 3.57. Qatar bolsters this strained argument by reference to the forged documents.

²⁶² BM Ann. 81, Vol. 3, pp. 432-433.

²⁶³ QM para.5.47.

²⁶⁴ See above and also BM paras. 426-431.

179. As discussed in Section 2.3.G, Qatar presents a similarly strained interpretation of the 1935 Qatar oil concession as well as other documents pertaining to oil concession negotiations in Bahrain.²⁶⁵

180. Qatar's Memorial offers another unsupported speculation in relation to a 1934 Royal Air Force reconnaissance report of the Qatar peninsula.²⁶⁶ The RAF report notes that:

"flying boats could take refuge in the southernmost bay of DJEZIRA HAWAR."²⁶⁷

A supplementary report by the RAF flying boat squadron confirms that:

"the southernmost bay of HAWAR ISLAND would possibly afford good shelter in emergency."²⁶⁸

On the basis of no other evidence or analysis than this, Qatar concludes that the RAF "was thus in no doubt at this time that Hawar island belonged to Qatar."²⁶⁹ This is self-evidently an untenable conclusion. The reports are variously titled "Report on Reconnaissance over Qatar Peninsula" and refer also to Muharraq Island, Zakhnuniyah Island, and other geographical locations that could not possibly have been considered as part of the territories of Sheikh Abdullah.²⁷⁰ The information that was being sought and

²⁶⁵ QM para. 6.26.

²⁶⁶ QM para. 6.27.

²⁶⁷ QM para. 6.27.

²⁶⁸ QM para. 6.27.

²⁶⁹ QM para. 6.27.

²⁷⁰ Letter from the British Political Resident to Air Headquarters, British Forces in Iraq, 5 June 1934, enclosing documentation relating to RAF reconnaissance of Qatar. QM Ann. III.94, Vol. 6, pp. 484-487.

relayed in the Report was purely geographical, as was also made clear during another "Qatar Peninsula Reconnaissance" conducted in October 1935.²⁷¹

181. Thus, Qatar's claim that the Hawar Islands were recognised as being part of the territories of the Al-Thani or a State of Qatar is without basis. To the contrary, the historical record – even those authentic documents relied upon by Qatar – establishes that the Hawar Islands were recognised as part of Bahrain. It could hardly be otherwise; if the true historical record had featured such acknowledgements and understandings, the British decision of 1939 (which is discussed below) would not have concluded that Qatar could marshal no evidence other than the legally irrelevant fact of proximity.

E. Qatar claims falsely that the Hawar Islands were never populated and could not support habitation

182. Qatar's Memorial asserts that the Hawar Islands were not inhabited and that the islands could not support a population by stating:

"It is a fact of nature that Hawar could not have been occupied permanently before Bahrain took it over in 1936/37."²⁷²

183. In the face of Qatar's unsupported statement, Section 3.6 of Bahrain's Memorial has described how the Hawar Islands supported a population of Bahrainis engaged in their traditional livelihoods of fishing,²⁷³ pearling,²⁷⁴ animal husbandry,²⁷⁵ and gypsum

²⁷¹ India Office Paper, Qatar Peninsula Reconnaissance, 15 October 1935. Ann. 70, Vol. 2, pp. 229-231.

²⁷² QM para. 6.174. It must be noted that this position seems to be contradicted in Qatar's claims to the Hawar Islands that are based on forged documents.

²⁷³ See BM Section 3.6.A.

²⁷⁴ See BM Section 3.6.B.

²⁷⁵ BM Section 3.6.C. Bahrain's Memorial noted that the Government has introduced a herd of oryx to Jazirat Hawar (BM para. 498).

quarrying.²⁷⁶ Bahrain's Memorial also described the physical evidence that attests to the existence of a settled population with a pattern of regular habitation. This evidence includes: water cisterns; no less than six cemeteries; the remains of two villages; an old mosque; and a replacement mosque that was built by the Bahrain Government in 1939.²⁷⁷

184. These facts were established by Bahrain and confirmed by British officials during the course of the 1938-1939 arbitration. They are consistent with the evidence in the public record of regular habitation of the islands by Bahrainis, including evidence dating from 1821-1829,²⁷⁸ 1845,²⁷⁹ 1873,²⁸⁰ 1908,²⁸¹ 1909,²⁸² and 1911,²⁸³ in addition to the 1930s²⁸⁴. The physical evidence described above still exists on the Hawar Islands and can be viewed by visitors today.

185. The Hawar Islands do not have any natural water wells, but there is well-documented evidence of water cisterns in the villages on the Hawar Islands that were used to retain rainwater.²⁸⁵ Eight of these cisterns can still be seen today.²⁸⁶ Some of

²⁷⁶ BM Section 3.6.D.

²⁷⁷ BM Section 3.6.E.

²⁷⁸ See Brucks, *op. cit.*, p. 563. BM Ann. 7, Vol. 2, p. 101. See also BM para. 415.

²⁷⁹ Recorded in Lorimer, *op. cit.*, p. 391. BM Ann. 74, Vol. 3, p. 378. See also BM para. 417.

²⁸⁰ See BM para. 432.

²⁸¹ Lorimer, *op. cit.*, Vol. II, p.1513. BM Ann. 74, Vol. 3, p. 399. See also BM para. 422.

²⁸² Letter from Capt. Prideaux, British Political Agent, to Major Cox, British Political Resident, 4 April 1909. BM Ann. 236, Vol. 5, p. 1039; QM Ann. III.53, Vol. 6, p. 245. See also BM para. 424. Also in letter from Capt. Prideaux, British Political Agent, to Major Cox, British Political Resident, 20 March 1909. BM Ann. 235, Vol. 5, p. 1034; QM Ann. III.51, Vol. 6, p. 293. See also BM para. 427.

²⁸³ Letter from Ruler of Bahrain to Major Cox, British Political Agent, 15 January 1911. BM Ann. 239 (a and b), Vol. 5, pp. 1050-1051. See also BM para. 436.

²⁸⁴ See generally BM Section 3.6.

²⁸⁵ Letter from Hugh Weightman, British Political Agent, to Lt. Col. Fowle, British Political Resident, 22 April 1939. BM Ann. 281, Vol. 5, p. 1165; QM Ann. III.195, Vol. 7, p. 497.

these cisterns were set at the confluence of natural drainage beds in order to obtain a maximum flow of water after a rainfall.²⁸⁷ Salman bin Isa al Dosari, a former Hawar Island resident, recalled that his father built two of the cisterns.²⁸⁸ A former neighbour of his, Nasr bin Makki al Dosari, who was born on Hawar Island, recalled the existence of the two cisterns and indicated that they were referred to by the Hawar Islanders by the names "El Makhzoon" and "El Gredeh".²⁸⁹

186. The water in the cisterns was a precious commodity and it was a cause of great excitement to the Hawar Island children to race to see how full the cisterns were after rain. One former Hawar Islander described this:

"There was no natural source of water so previous generations of Dowasir had built many cisterns all over the Island to catch the rain water during the rainy season. I remember as a child running to the nearest cistern to check how full it was after it had rained. I would race the other children back to the village to tell the elders how full it was. We were never allowed to swim or wash in the cisterns. We had to wait until the water settled and then we could draw off water for drinking and cooking."²⁹⁰

187. In addition to the water supply from the cisterns, water was also brought from Bahrain and stored in the water tanks of pearling boats. When supplies ran low, water would be brought and bartered by the fish merchants from Muharraq when they came to the islands to pick up the fish to take to market. A former Hawar Island resident recalled:

"When there was not enough water in the cisterns, the boats which would come from the islands of Bahrain and Muharraq to pick up the fish to

²⁸⁶ Archaeological Report on the Hawar Islands, Professor Paolo Costa, University of Bologna, 17 January 1995. BM Ann. 310, Vol. 6, pp. 1336-1337 ("Costa Report").

²⁸⁷ Costa Report. BM Ann. 310, Vol. 6, p. 1340.

²⁸⁸ Statement of Salman bin Isa al Dosari. BM Ann. 315, Vol. 6, p. 1393, para. 5.

²⁸⁹ Statement of Nasr bin Makki al Dosari. BM Ann. 314, Vol. 6, p. 1381, para. 11.

²⁹⁰ Statement of Hamoud bin Muhanna al Dosari. BM Ann. 313, Vol. 6, p. 1365, para. 15.

take to market would bring water. They would usually go to Muharraq to a place called Halat Abu Mahir, where there was a spring called Ain Fakhro to bring supplies of fresh water in the tanks. Additionally, if we were fishing near the west coast of the Qatar peninsula we would go to Zekrit. There was a spring there where we could get fresh water."²⁹¹

Charles Belgrave, the Adviser to the Government of Bahrain, recorded that "in years when the local (Hawar Islands) water supply fails they obtain water from Bahrain."²⁹²

188. The history of the Hawar Islands and the lives of its inhabitants – including their regular trade with the main island of Bahrain and Muharraq Island – has been recounted by Bahrainis who are still living and who grew up and lived on the Hawar Islands.²⁹³

189. It is no response to this mass of evidence – of which Qatar has been aware since at least 1939 – for Qatar now to assert baldly that it "is a fact of nature" that the Hawar Islands could not have been permanently occupied. The overwhelming evidence demonstrates that they could be, they were, and they still are occupied.

F. Qatar claims falsely that the Dowasir tribe, the principal occupants of the Hawar Islands, were not subject to the authority of Bahrain

190. Qatar's Memorial challenges the established view that the Bahrain Dowasir were residents of Bahrain and that they owed their allegiance to the Ruler of Bahrain.²⁹⁴

²⁹¹ *Ibid* at para. 16. See Statement of Ibrahim bin Salman Al Ghattam. BM Ann. 316, Vol. 6, p. 1402, para. 8, and Statement of Nasr bin Makki al Dosari. BM Ann. 314, Vol. 6, p. 1381, para. 11.

²⁹² Bahrain Counter-claim (in the form of a letter from Charles Belgrave, Adviser to the Bahrain Government, to Hugh Weightman, British Political Agent, 22 December 1938). BM Ann. 274, Vol. 5, p. 1133; QM Ann. III.174, Vol. 7, p. 373. In the light of the geographical proximity of the Hawar Islands to the west coast of the Qatar peninsula, it is noteworthy that the inhabitants of the Hawar Islands shipped water from within Bahrain and not from the Qatar peninsula, except if they were fishing very close to the coast, when they would use the spring at Zekrit.

²⁹³ See statements of Bahrainis who formerly lived in the Hawar Islands in BM Ann. 313-316, Vol. 6, pp. 1363-1413.

²⁹⁴ QM paras. 6.53 and 6.104-6.105. Paragraph 6.53 also states – without reference to any authority – that the Ruler of Bahrain was deposed in 1923. This odd assertion is not true. Sheikh Isa bin Al-Khalifa ruled from 1869-1932. The 1923 reforms referred to related to pearl-diving regulations and other administrative matters of government.

Whilst Qatar's argument is largely based on the forged documents, which Bahrain disregards, Qatar also endorses the opinion to this effect of a British Political Agent, Major Alban, made in a 1941 despatch.²⁹⁵ Both Qatar's view and Major Alban's report are unsubstantiated by any evidence. They contradict the overwhelming historical evidence to the contrary cited in Bahrain's Memorial, in this Counter-Memorial and even in documents cited in Qatar's Memorial.²⁹⁶

191. The first claim – that the Bahraini Dowasir were not really residents of Bahrain – can be quickly dismissed. The material in Section 3.5 of Bahrain's Memorial establishes beyond doubt that they were. The record is clear. Thus, in 1869, the British Political Resident wrote to "the Chief and Members of the Dowasir Tribe" in Budaiya and Zellaq to insist that they conform to an interdiction on smuggling from Bahrain:

"I request you will oblige me by arranging that neither persons, animals or property be allowed to leave the coast of Bahrein.

Should any craft or person attempt to leave, please detain her or him and inform me. Any of the Dowasir tribe coming on board my ship will have safe conduct and be politely received.

Should persons or property be allowed to depart without my consent, the consequences will be on the head of all concerned."²⁹⁷

Similarly, the 1917 Gazetteer of Arabia recorded:

"In Bahrain the Dowasir are the most numerous Sunn'i tribe after the Utub [Al Khalifa], and are the second of all the Bahrain tribes in political importance, being inferior in this respect to the Utub only."²⁹⁸

²⁹⁵ QM para. 6.104. See also the discussion on Alban and Prior in Section 2.3.H *infra*.

²⁹⁶ See BM Sections 3.5 and 3.6.

²⁹⁷ Letter from the British Political Resident to the Chief and Members of the Dowasir Tribe at Budaiya and Zellaq, 21 November 1869. Ann. 7, Vol. 2, pp. 14-15.

²⁹⁸ Gazetteer of Arabia, Vol. 1, p. 487. Ann. 46, Vol. 2, pp. 142-143.

192. As the sole support for the second claim – that the Bahrain Dowasir were not subject to the authority of the Ruler of Bahrain – Qatar and Major Alban refer to the period of three and a half years (from autumn of 1923 to spring of 1927) when the Bahrain Dowasir removed themselves from Bahrain. However, that episode does not support Qatar's proposition. In fact, it supports exactly the opposite conclusion.

193. The principal documents relating to this short episode are contained in a special India Office file entitled The Dowasir tribe and their removal from Bahrain; their return and retrieval of their property, which covers the period 1922-1928.²⁹⁹ Bahrain does not propose to replicate the entire file here. However, the documents in it make abundantly evident that, although occasionally argumentative, the Bahrain Dowasir were subjects of the Ruler of Bahrain:

"The Dowasir have been settled so long in Bahrain that they are recognised as Bahrain subjects."³⁰⁰

Other salient facts emerge from the file:

- the Dowasir threatened to remove themselves from Bahrain as part of an attempt to resist government administrative reforms in Bahrain (related mainly to pearling, but also the imposition of new taxes on the Dowasir);³⁰¹
- the Ruler of Bahrain called their bluff and permitted the Dowasir to leave;

²⁹⁹ Public Record Office File R/15/2/87.

³⁰⁰ Note from British Political Agent, to British Political Resident, entitled "Bahrain Affairs," 13 July 1922, at p. 3. Ann. 49, Vol. 2, pp. 155-158. See also QM Ann. III.72, Vol. 6, p. 379.

³⁰¹ Letter from Lt. Col. A.P. Trevor, British Political Resident to D. de S. Bray, Foreign Secretary to Government of India, 16 July 1922. Ann. 50, Vol. 2, pp. 159-161. Qatar claims in paragraph 6.53 of its Memorial that the Dowasir created disturbances because of the deposition of the Ruler of Bahrain. However, the Ruler of Bahrain was never deposed and Qatar does not cite any authority for this strange claim. Furthermore, the document on which Qatar relies regarding its Dowasir claim actually supports Bahrain's description of events. Qatar seems to have misinterpreted a reference in this document to "the new régime" of taxes and lost privileges as being a reference to a new political leadership.

- almost immediately thereafter the Dowasir began supplicating to be allowed to return to Bahrain;³⁰² this is acknowledged in Qatar's Memorial;³⁰³

- the conditions proposed for the Dowasir return to Bahrain were that they could not claim to be internally autonomous from the Ruler of Bahrain and:

"They would have to pay the same taxes as other agriculturists and traders, they must be submissive to the Shaikh's Courts in Manama and Muharraq, and they should accept the police post which had been established in their chief town. Their official headmen would be nominated and could be changed, if necessary, by the Ruler, and their Baharani (Shiah) tenants and ... divers would be fully protected and have equal rights of citizenship with others of their class."³⁰⁴

- these unequivocal terms are acknowledged by Qatar's Memorial;³⁰⁵

- the Dowasir agreed to return under these conditions imposed by the Ruler of Bahrain;³⁰⁶

- when the Dowasir returned to Bahrain in 1927, the British Political Resident:

"informed them categorically that the whole matter rested with their acceptance of the laws of the country, that as long as they realised that they were as subject to law as any other person in Bahrain and had no privileged position Shaikh Hamad would naturally be glad to see them back in Bahrain. They accepted the condition without reserve and the interview ended amicably."³⁰⁷

³⁰² Memorandum from British Political Agent to British Political Resident, 31 March 1924. Ann. 53, Vol. 2, pp. 170-172.

³⁰³ QM para. 6.54.

³⁰⁴ Despatch from British Political Resident to the Foreign Secretary of India, 4 December 1926. QM Ann. III.70, Vol. 6, p. 369. See also QM Ann. III.72, Vol. 6, p. 379.

³⁰⁵ QM para. 6.54.

³⁰⁶ Despatch from British Political Resident to Foreign Secretary of India, 27 March 1927. QM Ann. III.73, Vol. 6, p. 383.

³⁰⁷ Despatch from British Political Resident to Foreign Secretary of India, 27 March 1927. QM Ann. III.73, Vol. 6, p. 383.

194. Further details, all of which confirm the historical account, can be found in the India Office memo entitled Desire of Dowasir tribe to return to Bahrain, dated 7 July 1927. It must be recalled, in addition, that:

- the Bahraini Dowasir have lived under the authority of the Ruler of Bahrain for almost two hundred years; their absence for some 3½ years represents an insignificant part of that time;
- there are consistent records of the Bahraini Dowasir recognising the authority of the Ruler of Bahrain, including using the Ruler's flag,³⁰⁸ indeed, the Bahraini Dowasir Sheikhs were related by marriage to the Rulers of Bahrain;³⁰⁹
- during the time that the Bahraini Dowasir absented themselves from Bahrain, they left their villages of Budaiya and Zellaq on the main island of Bahrain and the Hawar Islands, thereby demonstrating that they acknowledged the Hawar Islands were also under the authority of the Ruler of Bahrain.

195. Thus, contrary to Qatar's unsubstantiated assertions, the historical record establishing that the Bahrain Dowasir recognised the authority of the Ruler of Bahrain is not disturbed by this incident.³¹⁰ This is recognised in the very documents cited by Qatar at the relevant places in its Memorial.³¹¹ Indeed, the fact that the Dowasir protest consisted of leaving the Hawar Islands is a compelling indication that they considered that they were removing themselves from the territory of Bahrain; they asked and were ultimately permitted to return to Bahrain.

³⁰⁸ See Administrative Report for Bahrain Political Agency for the year 1911. BM Ann. 237, Vol. 5, p. 1044. See also BM para. 429.

³⁰⁹ Letter from Capt. Prideaux, British Political Agent, to Major Cox, British Political Resident, 4 April 1909. BM Ann. 236, Vol. 5, p. 1039. See also BM para. 424.

³¹⁰ The fact that the Bahraini Dowasir inhabited the Hawar Islands on a regular basis consistently from the beginning of the 19th Century has been discussed in Bahrain's Memorial in Chapter 3 and in this Counter-Memorial at Section 2.3.E.

³¹¹ QM paras. 6.53-6.57.

G. Qatar's version of the history of oil concession negotiations is a fabrication

196. The historical record of the negotiations for oil concessions in Bahrain and Qatar contradicts Qatar's claim that the Hawar Islands were understood to be part of Qatar. Rather, it establishes that from the early 1930s, when issues regarding the ownership of the Islands first arose, until the British decision awarding them to Bahrain in 1939, the Hawar Islands were consistently regarded by Bahrain and Britain as within the territories of Bahrain.

197. The true history of the concession negotiations also makes it impossible to accept Qatar's accusation that Britain had ulterior motives allegedly leading it to conduct the 1939 arbitration with bias against Qatar. Qatar has argued that the decision to acknowledge Bahrain's sovereignty over the Hawar Islands furthered British interests.³¹² The facts plainly show, to the contrary, that if Britain had allowed itself to be guided by such impulses rather than by legal principle, it would have favoured the grant of the Hawar Islands to Qatar.

(i) The 1925 Bahrain oil concession

198. Negotiations for the Bahrain oil concession commenced in the early 1920s between the Eastern and General Syndicate (EGS), a British registered company, and the Ruler of Bahrain. Pursuant to an undertaking given by the Ruler of Bahrain in 1914 not to grant any oil concessions in his territory without Britain's prior approval,³¹³ the Ruler involved the British Government at every step of the negotiations.

199. Early drafts of the concession agreement prepared by EGS sought to define the area to be covered by the concession, often with the aid of maps. Qatar relies on one

³¹² QM Chapter III, Section 5 and Chapter VI, Section 2.B.3.

³¹³ Telegram from Secretary of State for India to Viceroy for India, 15 August 1929. BM Ann. 95, Vol. 3, p. 553.

such map accompanying a 1923 draft concession agreement – in isolation and presented out of context – as evidence demonstrating "Bahrain's assumption and therefore [*sic*] its recognition that the Hawar Islands belonged to Qatar".³¹⁴ Qatar bases its assertion on the fact that the Hawar Islands are shown on this map in white, the same colour as the peninsula of Qatar, while the area of the prospective concession is shown in red and covers only the four principal islands of the Bahrain archipelago: Bahrain Island, Muharraq, Sitrah and Umm Na'assan.³¹⁵

200. Qatar's reliance on this map is misplaced. The purpose of the red colouring on the map was to define the area proposed by EGS to be covered by the concession. Neither of the parties to the negotiation, nor Britain, considered the red colouring to delimit the boundaries of Bahrain. This is confirmed by the legend appearing on the map itself, which reads: "It is Agreed by Both Parties to this Agreement ... that the AREA painted Red on this MAP is the Area to which the BAHREIN CONCESSION ATTACHED HERETO refers."³¹⁶ This conclusion is further supported by the fact that while the Qatar peninsula is shown in white, so also is the entire eastern coast of Arabia, as well as other States in the region.

201. Two years later, in December 1925, with Britain's approval, the Ruler of Bahrain awarded the Bahrain oil concession to EGS. The relevant Articles of the Concession Agreement provided:

"Article I. The Sheikh grants to the Company ... an exclusive exploration license ... whereby the Company shall be entitled throughout the whole of the territories under his control to explore and search the surface of such territories

³¹⁴ QM para. 5.51, p. 74.

³¹⁵ Draft Concession Agreement between the Ruler of Bahrain and Eastern and General Syndicate Limited, 12 May 1923. QM Ann. III.66, Vol. 6, pp. 327 and 345.

³¹⁶ *Ibid.*

Article V. The Sheikh hereby undertakes ... to grant to the Company on the expiration of the prospecting license or earlier if application therefor is made by the Company, a mining lease over an aggregate not exceeding 100,000 acres divided into not more than three blocks³¹⁷ (Emphasis added.)

202. Qatar's entire argument that Britain and Bahrain recognised Qatar's sovereignty over the Hawar Islands in the early 1930s focuses on the underlined words in Article 1 of the Agreement. Qatar argues that because the area granted under the concession was in respect of the "territories under [the Ruler of Bahrain's] control", and as the Hawar Islands were not included within the concession area, the Hawar Islands were thus considered by Britain and all other parties as not within Bahrain's control.³¹⁸

203. The flaw in Qatar's syllogism arises from the simple fact that the 1925 Bahrain Concession was never intended to cover any territory beyond that of the main island of Bahrain.³¹⁹ The question of the Hawar Islands aside, even Qatar has never questioned that the territories of Bahrain include some 30 islands in addition to the main island of Bahrain. The fact that the other principal islands of the Bahrain archipelago were not included in the definition of the concession territory indicates that the Concession Agreement's grant of exploration rights "throughout the whole of the territories under [the Ruler of Bahrain's] control" was never intended to reflect the full extent of the Ruler's sovereignty. Rather, the language had been drafted by EGS as expansively as possible to ensure that no geologically significant territory would be excluded from its concession area. As long as the language was broad enough clearly to incorporate

³¹⁷ Concession Agreement, 2 December 1925. BM Ann. 90, Vol. 3, p. 529; QM Ann. III.68, Vol. 6, p. 353.

³¹⁸ See QM paras. 6.13 *et seq.*, pp. 92-95.

³¹⁹ Letter from J.G. Laithwaite, India Office, to F.C. Starling, Petroleum Department, 3 May 1933 ("The existing Bahrein Petroleum concession is I understand in respect of areas in Bahrein Island only"). QM Ann. III.84, Vol. 6, p. 431. See also, Copy of Letter from Chief Local Representative of BAPCO to the British Political Agent, 8 August 1933 ("Further I should like to know whether it is correct to assume that the "area remaining" includes all that portion of the main Island of Bahrain that may prove to be outside the 100,000 acres when selected and also all of the smaller Islands of the Bahrain Group ..."). Ann. 63, Vol. 2, pp. 211-212.

Bahrain's main island, EGS was satisfied. The full extent of the Sheikh's territories at this stage was irrelevant as far as EGS was concerned.

204. Facing operating capital problems, EGS in 1928 assigned its concession to the Bahrain Petroleum Company Limited (BAPCO), a wholly owned subsidiary of Standard Oil Company of California (SOCAL), registered in Canada. At this time, Britain had become concerned over American economic competition in the region. Accordingly, Britain had laid down that any assignment of the Bahrain concession should be subject to its approval. Britain had also prohibited the assignment of the concession to a non-British company.³²⁰ BAPCO's Canadian – *i.e.*, Commonwealth – nationality was an artificial device that had been conceived by SOCAL³²¹ to circumvent Britain's objective of ensuring that the Bahrain concession should not be assigned to a non-British company.³²²

205. As will be seen, the establishment in Bahrain of what was for all practical and economic purposes an American oil company – notwithstanding the fact that Bahrain had for so long been one of the principal staging points for British petroleum activities in the Gulf and notwithstanding the safeguards imposed by Britain – had a significant impact on the direction the British Government's policies concerning future oil concession negotiations would take. After this, Britain was to do its utmost to promote the interests of British oil companies over those of American oil companies.

³²⁰ BM para. 235.

³²¹ SOCAL's involvement in the region was not limited to Bahrain. It had also secured important concessionary rights in Saudi Arabia, which was not under British protection. In 1933, in spite of competition from the British-controlled Iraq Petroleum Company, Ibn Saud had awarded the Saudi concession to SOCAL, with the result that United States, as opposed to British, interests had gained control of the eastern Saudi Arabian oil concession.

³²² BM paras. 236-237.

(ii) Negotiations for the Bahrain Unallotted Area concession: 1928-1933

206. That portion of the Ruler of Bahrain's territory not covered by the 100,000 acre option that had been awarded to EGS under the 1925 Bahrain Concession came to be known as the "Bahrain Additional Area" or "unallotted area".

207. Qatar's Memorial asserts that "[t]here is strong evidence that throughout the negotiations on an additional area between 1928 and 1933, both the British officials and the oil companies themselves were clearly of the view that the Hawar islands did not belong to Bahrain."³²³ In fact, a review of the history of these negotiations establishes quite the opposite. It shows that from the first occasion on which the ownership of the Hawar Islands first arose as a negotiation issue in 1933, Britain recognised that the islands were claimed by Bahrain. No mention, however, is made at all of a competing claim to the Hawar Islands by Qatar. The truth of the matter is that the Doha Sheikhs probably were not even aware of the existence of the Islands.

208. An application for the Bahrain unallotted area was first made in 1928 by EGS. Major Frank Holmes, at the time EGS' local representative in Bahrain, attempted to identify specifically the area applied for:

"The total area of the Bahrain Islands including its Territorial Waters is roughly 198,000 acres approximately 309 square miles.

The Area granted under the Bahrain Oil Concession Agreement is 156 square miles. Therefore this request is for permission to negotiate for the balance of the total area including Territorial Waters which is 153 square miles equalling 97, 920 square acres."³²⁴

³²³ QM para. 6.13.

³²⁴ Letter from Major Frank Holmes (EGS) to the British Political Agent, 23 April 1928. QM Ann. III.74, Vol. 6, p. 389.

209. Qatar relies on these calculations by Major Holmes in two places to support its claim that neither Britain nor Bahrain's concessionaires considered the Hawar Islands to fall within the "unallotted area" and to be part of the territories of Bahrain:

"Now, it is clear that the acreage of the 'Area Remaining' applied for by Major Holmes in 1928 (amounting to 97,920 acres) is altogether too small to be capable of being interpreted as including such areas as the Hawar islands, Fasht Dibal or Qit'at Jaradah ..."³²⁵

210. This is true, but unremarkable. As discussed above, the 1925 Bahrain Concession applied only to territory on the main island of Bahrain. EGS' sole interest was in gaining the concession rights to territory thought to be part of the oil-bearing structure. The application submitted by EGS in 1928, thus was for all of the territory remaining on the main island of Bahrain, as well as the three other immediately adjoining islands of Muharraq, Sitrah and Umm Na'assan. It did not include other islands, territories or territorial waters of Bahrain. Major Holmes' calculations accordingly only pertained to those specified areas.³²⁶

211. Similarly, Qatar relies on certain acreage calculations relating to the unallotted area concession made by the British Government's Petroleum Department several years later, once again taken out of context, in further support of its assertion that Britain did not recognise the Hawar Islands to be part of the Bahrain Islands group.³²⁷ What Qatar fails to note is that these calculations were made simply in the context of evaluating the implications of including a one-mile belt of territorial water around the concession area that had been granted to BAPCO in 1925 (only on the main island of Bahrain) and around the immediately adjoining islands for which BAPCO had subsequently applied. As the only areas under discussion were those allotted on the four islands mentioned in

³²⁵ QM paras. 6.17 and 5.52.

³²⁶ Letter from Major Frank Holmes (PCL) to H.R. Ballantyne (BAPCO), 6 September 1933. QM Ann. III.93, Vol. 6, pp. 475-478.

³²⁷ QM paras. 6.18 and 6.19.

the preceding paragraph, the calculations made by the Petroleum Department naturally did not include the Hawar Islands.³²⁸

212. The first mention in British records of any issue concerning the ownership of the Hawar Islands appears in 1933, in the context of an application by BAPCO for an extension of its Bahrain oil concession.³²⁹

213. An agreement in principle was reached between the Ruler of Bahrain and BAPCO, whereby the Ruler agreed to grant BAPCO

"the exclusive right and easements whereby the Company shall be entitled throughout the whole of that portion of His Excellency the Shaikh's Territories – including all the Islands and all the Territorial Waters – remaining after excluding and apart from that area already covered by the Concession Agreement dated December 2nd 1925, to explore and search the surface of the abovementioned area ... upon the following terms and conditions ...

(c) The Concession granted covering the whole of the additional area including all the Islands and all the Territorial Waters of the Shaikh's Dominions shall be governed in all ways by the terms and conditions as laid down in the [1925] Concession Agreement."³³⁰ (Emphasis added.)

214. The expansive terms in which the proposed concession area was described prompted the British Government to look into the question of the area of covered by "all ... of the Shaikh's Territories – including all the Islands and all the Territorial Waters". The record of these early enquiries demonstrates, contrary to Qatar's assertions, that Britain had never had occasion to examine the matter prior to this time:

"I have been looking into the question of the area covered by the Sheikh of Bahrein's dominions ... The Sheikh maintains a rather nebulous claim to certain areas on the Arab coast His dominions may be regarded as

³²⁸ Letter from F.C. Starling (Petroleum Department) to J.G. Laithwaite (India Office), 17 August 1933. QM Ann. III.92, Vol. 6, p. 469.

³²⁹ Letter from BAPCO to the British Political Agent, 4 April 1933. Ann. 57, Vol. 2, pp. 197-199.

³³⁰ Letter from Major Frank Holmes (BAPCO) to the British Political Agent, 17 May 1933. Ann. 58, Vol. 2, pp. 200-202.

consisting of the Bahrein archipelago. The Bahrein archipelago consists of the Island of Bahrein, and the adjoining islands of Muharraq, Umm Na'assan, Sitrah and Nabi Salih.... The existing Bahrein Petroleum concession is I understand in respect of areas in Bahrein Island only.... The information above, which is I fear rather scrappy, is taken from Lorimer's Gazetteer. The Persian Gulf Pilot suggests that the archipelago is surrounded by reefs running out to a considerable distance and banks to which the Sheikh would no doubt lay claim if any question arose; and in considering any grant of a concession in respect of his 'dominions' or 'Bahrein' it would seem necessary to have a clear understanding as to precisely what is covered³³¹

215. As the matter was investigated further, the implications of the BAPCO proposal for territorial issues, which until then had been dormant and irrelevant, became clearer. Lt. Col. Gordon Loch, at the time the British Political Agent, reported the situation as follows:

"There is one point on which I should give a serious warning. The phrase 'all the Islands and all the Territorial waters' is a dangerous one, for besides the well known islands of Bahrain (the main island, Muharraq, Sitrah and one or two islets) claims are still made to other islands and to areas on the Qatar coast (and possibly even on the Hasa coast). That these claims are not regarded locally as dead and gone is shown by the fact that I have heard mutterings that the explorers of the Anglo-Persian Oil Company Limited in Qatar have examined places to which the Ruler of Qatar had no right to allow them to go, and which people of Bahrain frequent to this day as a summer resort; indeed, it is said that as late as last year (1932) the Ruler of Qatar admitted in public that certain areas on the Qatar coast pertain to Bahrain. I have refrained from making enquiries, but the fact of my having heard of the matter shows that an awkward incident might arise at any time, unless the area allotted to the Company is carefully laid down."³³²

216. The British Political Agent's advice to his superiors shows that Britain was well aware of the fact that the Ruler of Bahrain had claims to islands and territories in addition to the islands which constituted the core of the Bahrain archipelago, yet no

³³¹ Letter from J.G. Laithwaite (India Office) to F.C. Starling (Petroleum Department), 3 May 1933. QM Ann. III.84, Vol. 6, p.431.

³³² Letter from the British Political Agent to the British Political Resident, 29 May 1933. Ann. 59, Vol. 2, pp. 203-206.

mention was made of any sort of claim by the Ruler of Qatar.³³³ Britain's concern at this point was to avoid an "awkward situation" arising with Ibn Saud, as a result of oil exploration activities being conducted by BAPCO in areas on the Qatar peninsula which Ibn Saud claimed belonged to him.

217. In June 1933, the Anglo-Persian Oil Company decided to join the competition for the Bahrain unallotted area.³³⁴ The introduction of a British commercial interest into the equation increased Britain's concern to ensure that any additional concession rights awarded to the American-owned BAPCO were confined to as small an area as possible.³³⁵ BAPCO at this time was apparently unaware of the strength of the Ruler of Bahrain's claim to the Hawar Islands. British officials, however, were sensitive to the possibility that a BAPCO claim to concession rights in the islands could arise at any time. In order to pre-empt the possibility of such an eventuality materialising, Britain proposed that any agreement with BAPCO regarding the unallotted area specifically refer to the concerned islands of the Bahrain group by name:

"It would however be prudent to name islands *i.e.* Bahrain Island, Muharraq and Sitrah (Umm Naasan and other islets near main island might be included if question is raised), otherwise controversy may arise over Hawar Island and Bahrain claim to certain places on the west coast of Qatar peninsula."³³⁶

³³³ *Ibid.* Report from Capt. Gastrell to the British Political Resident, 30 July 1933. QM Ann. III.87, Vol. 6, pp. 445-448; Telegram from the British Political Resident to the Government of India, 31 July 1933. QM Ann. III.88, Vol. 6, pp. 449-452.

³³⁴ Letter from Yusuf bin Ahmed Kanoo to the British Political Agent, 21 June 1933 (APOC applied for permission to negotiate for "those areas in the territories of Bahrain which are not yet allocated for such development"). Ann. 60, Vol. 2, p. 207.

³³⁵ Letter from the British Political Resident to the Secretary of State for the Colonies, 22 June 1933 ("It seems to me there are obvious advantages in having a second competitor, especially British, in the field."). Ann. 61, Vol. 2, p. 208; Letter from the British Political Resident to the British Political Agent, 29 June 1933 ("It would, as you will appreciate, be much more satisfactory from our point of view if remainder of Island were to be developed by Anglo Persian Oil Company or Iraq Petroleum Company..."). Ann. 62, Vol. 2, pp. 209-210.

³³⁶ Telegram from British Political Resident to the Secretary of State for the Colonies, 23 July 1933. QM Ann. III.85, Vol. 6, p. 437.

218. The Ruler of Bahrain refused to jeopardise his sovereignty over the Hawar Islands and Zubarah, and accordingly objected to the proposal. He informed the British Government that the islands off the Qatar peninsula were dependencies of Bahrain and that he did not wish any misunderstanding to arise from the omission of these islands in any list. At the same time, however, Bahrain was in need of the concession royalties. The Ruler of Bahrain knew that the British Government was cognisant of his position in relation to the Hawar Islands and other areas on the Qatar coast. Moreover, he did not wish to forestall the conclusion of the oil negotiations. He accordingly agreed to the use of the term "Bahrain Islands" to distinguish the core islands of the Bahrain archipelago from the islands of the periphery and the territories on the Qatar peninsula, clearly on the understanding that this did not involve a compromise of his position. The Ruler of Bahrain's acceptance of the British proposal, viewed in its proper context, was in no way an acknowledgement by the Ruler that the Hawar Islands were not his, as Qatar contends. The British Political Agent reported:

"As regards the designation of the area, the Shaikh and his son immediately objected to the 'islands' being shown by name. They explained that the islands off Qatar were the cause of this hesitancy (here the Shaikh added that the Foreign Office knew that these islands are the dependencies of Bahrain and that there is a ninety year old agreement somewhere to this effect) and, therefore, to avoid any misunderstanding by the omission of these islands, they would like the area to be called 'Bahrain Islands'."³³⁷

219. This geographic distinction was clearly understood and endorsed by Britain as indicated in the British Political Resident's report to the Secretary of State for India:

"[Shaikh] desires that area be called Bahrain Islands without specifically naming any so that the question of Hawar Island and Qatar will not be

³³⁷ Despatch from the British Political Agent to the British Political Resident, 30 July 1933. QM Ann. III.87, Vol. 6, p. 445. Telegram from the British Political Resident to the Government of India, 31 July 1933. QM Ann. III.88, Vol. 6, p. 449.

made prominent by their omission. I think we may accept this as Hawar Island is clearly not one of the Bahrain group."³³⁸

220. The manner in which the British Political Resident's opinion is expressed indicates that he was acknowledging this distinction as reflecting nothing more than a geographical reality. Contrary to Qatar's assertions, in no way was he opining on the Ruler of Bahrain's claim of sovereignty over the Islands. Fowle was aware of the fact that BAPCO's application for the Bahrain unallotted areas related only to territory on the main island of Bahrain and the immediately adjoining islands. Thus, if the American-owned BAPCO were to set its sights on other islands pertaining to Bahrain, the British Government could always claim that the term "Bahrain Islands" was only intended to cover the area for which BAPCO had applied.

221. Britain was now satisfied that it had forestalled a possible claim to the Hawar Islands by BAPCO under the proposed additional area concession by the use of the term "Bahrain Islands". Discussion then turned to whether a possible claim could be made by BAPCO under the 1925 Concession Agreement to concession rights in the Hawar Islands and areas on the Qatar coast.

"We have been considering whether there is any risk, in view of the reference to the Sheikh's 'territories' in the Agreement of December, 1925, of a claim being put forward by the Syndicate [*i.e.*, BAPCO] to rights in respect of Hawar and the area in Qatar to which a vague claim is maintained by Bahrain."³³⁹

222. It is evident, from the reasons marshalled by Britain for objecting to a claim by BAPCO to expand its concession area, that Britain had at this juncture still made no effort to examine the Ruler of Bahrain's sovereignty over the Hawar Islands. It thus "presumed", by virtue of the Hawar Islands' geographical proximity to the west coast of

³³⁸ Telegram from the British Political Resident to the Secretary of State for India, 31 July 1933. QM Ann. III.88, Vol. 6, p. 449.

³³⁹ Letter from J.G. Laithwaite (India Office) to F.C. Starling (Petroleum Department), 9 August 1933. QM Ann. III.91, Vol. 6, p. 461.

Qatar, that the islands could not be considered under the 'control' of the Ruler of Bahrain and hence be open to a claim by BAPCO. The British Government thus decided that its response to BAPCO in the event that BAPCO sought to include the Hawar Islands and Zubarah in its concession area could be grounded in the language of the 1925 Concession Agreement itself:

"The exploration licence granted under the Agreement of 2 December 1925 (from the area specified in which the areas under the prospecting license and mining lease must be selected) is, however, in respect of 'the whole of the territories under' the Sheikh's 'control'. This seems clearly to exclude areas in Qatar and presumably also would exclude Hawar which belongs in any case geographically to Qatar, and is the western most and the largest of a group of islands just off the Qatar coast.... The position in regard to any concession in respect of the balance of the Sheikh's territories outstanding after the mining lease is taken up under the original concession will be safeguarded ... by the use ... of the phrase 'Bahrein Islands.'³⁴⁰ (Emphasis added.)

223. It is significant that at no time during the entire discussion regarding the definition of the Bahrain unallotted area concession did Britain once mention any sort of rights of the Ruler of Qatar to the Hawar Islands. This is all the more significant in view of the fact that Britain was at this time promoting and participating in the negotiations between the Ruler of Qatar and the British Anglo-Persian Oil Company ("Anglo-Persian") for the Qatar oil concession. Had there been any basis for a claim by the Ruler of Qatar, it would surely have been actively supported by Anglo-Persian, and at least some acknowledgement of it found in British records. Yet Qatar has presented no such claim in its Memorial, and Bahrain has encountered no such evidence.

224. On 11 August 1933, BAPCO withdrew its offer for an additional concession to the Bahrain unallotted area, leaving on the table only a request for an extension of its original prospecting licence. Among members of Bahrain's Ruling Family it was felt

³⁴⁰ *Ibid.*

that Britain had failed to act in Bahrain's best interests, favouring instead British commercial interests:

"Sheikhs Abdulla and Sulman do not hesitate to say that the British Government has dissuaded Bahrain from coming to terms with the American company over the additional area in order to help A.P.O.C. [Anglo-Persian] to get a footing in here ..."³⁴¹

225. In November 1933, the Ruler of Bahrain granted BAPCO's request for an extension. This in effect placed the issue of the definition of the Bahrain unallotted area in abeyance. Until BAPCO had selected its 100,000 acres under the original 1925 concession, it was not possible to define the unallotted area. Eventually, in 1934, the Ruler of Bahrain and BAPCO eventually signed a mining lease under the 1925 concession for an area of 100,000 acres on the main island of Bahrain.

226. In sum, the historical record of the negotiations for BAPCO's bid to extend its 1925 Bahrain concession establishes that Britain was clearly aware, from the moment when the question of sovereignty over the Hawar Islands first arose, of the claims asserted by the Ruler of Bahrain to the Islands. Conversely, not once did Britain at this stage refer to the existence of a competing claim by the Ruler of Qatar. Qatar's attempt to rely on British documents to establish Britain's recognition of Qatar's sovereignty over the Islands, and by implication a competing claim to the Islands by the Ruler of Qatar, is entirely without merit. Similarly, as discussed below, Qatar's attempt to rely on the oil concession awarded in 1935 to Anglo-Persian by the Ruler of Qatar, as evidence of Britain's recognition that the Hawar Islands belonged to Qatar, is baseless.

(iii) The 1935 Qatar oil concession

227. The discovery of oil in Bahrain in 1932 gave rise to considerable interest in the prospect that oil might be found in Qatar. Britain considered it important that Anglo-

³⁴¹ Letter from Charles D. Belgrave, Financial Adviser to the Bahrain Government, to the British Political Agent, 16 August 1933. Ann. 64, Vol. 2, pp. 213-215.

Persian succeed in its negotiations for the Qatar Concession, not only in order to further British commercial interests (American oil companies had already obtained concessions in Saudi Arabia and Bahrain), but also in order to contain the extension of Ibn Saud's influence on the Qatar peninsula.

228. In its attempts to support Anglo-Persian's application for the Qatar concession, Britain was able to invoke the threat posed by Ibn Saud to the Ruler of Qatar's hopes for autonomy against the Ruler of Qatar. Britain informed the Ruler of Qatar that it would agree to guarantee his southern border with Saudi Arabia, but only on the condition that the Qatar concession was granted to Anglo-Persian. The Ruler of Qatar agreed.

229. A concession agreement was accordingly signed by Anglo-Persian and the Ruler of Qatar on 17 May 1935, with the approval of the British Government.³⁴² Within months of its signing, Anglo-Persian assigned the concession to Petroleum Concessions Limited (PCL), a subsidiary of the Iraq Petroleum Company, in which Anglo-Persian was a major shareholder.

230. Pursuant to Article 1 of the 1935 Qatar Concession, the Ruler of Qatar granted to Anglo-Persian various rights to explore, to prospect, to drill for and to extract petroleum and other specified substances "throughout the principality of Qatr".³⁴³

231. Article 2 provided:

"... the Company can operate in any part of the State of Qatr as is defined below The State of Qatr means the whole area over which the Shaikh rules, and which is marked on the north of the line drawn on the map attached to this Agreement."³⁴⁴

³⁴² Agreement between the Anglo-Persian Oil Company and the Ruler of Qatar, 17 May 1935. BM Ann. 104, Vol. 3, p. 615; QM Ann. III.99, Vol. 6, p. 507.

³⁴³ *Ibid.*

³⁴⁴ *Ibid.*

232. The language of Article 2 avoided defining the area over which the Ruler of Qatar ruled. Nonetheless, Qatar relies on Articles 1 and 2 of the 1935 Concession Agreement, and in particular the map attached thereto, as support for its assertion that the "Hawar group of islands is unmistakably comprehended within the territory of the State of Qatar as so defined."³⁴⁵

233. Qatar's contention does not withstand scrutiny. As discussed in further detail below, in April 1936, in the context of an application for a concession to the Bahrain unallotted area, PCL requested the British Government to clarify whether the Hawar Islands were considered to belong to the Ruler of Qatar or to the Ruler of Bahrain. In support of its assertion that in Qatar Concession included the Hawar Islands, PCL referred to the 1935 Concession Agreement, which had been approved by Britain, and the map referred to in that Article:

"We are, as you know, now negotiating with the Shaikh of Bahrain for that part of his group of islands which has not already been given to the Californians [*i.e.* BAPCO]. He has commenced by claiming that the Island of Hawar is part of his dominions. This island is, in fact, situated off the west coast of Qatar, from which it seems to be not more than $\frac{3}{4}$ miles distant at its nearest point. The island is shown on the official map of Qatar which was signed by the Shaikh of Qatar ... and which forms part of the Qatar Concession. This map, I believe, was seen and approved by the Political Resident and, perhaps, the India Office. All this points to its forming part of Qatar and not of Bahrain."³⁴⁶

234. As a matter of geography, the Hawar Islands were included on the map attached to the agreement north of the line – but so was all of Bahrain. The only conclusion that can be drawn from the text of the Agreement and the map is that the Qatar concession was to operate on such territory north of the line over which the Sheikh of Qatar did in

³⁴⁵ QM para. 6.26, p. 97. As discussed in Section 2.2.I, in 1935 the Sheikh's authority was only established in the Doha enclave and nothing more.

³⁴⁶ Letter from J. Skliros (PCL) to J.C. Walton (India Office), 29 April 1936. QM Ann. III.104, Vol. 7, p. 21.

fact rule. This posed the question of the extent of the Sheikh of Qatar's sovereignty; it did not answer it.

235. PCL's spurious argument was thus quickly dismissed by the India Office:

"I doubt whether the map attached to the Qatar concession is relevant in this connection – its object was to define the southern boundary of the Concession. Incidentally, it marks the Bahrein Islands as well as Hawar."³⁴⁷

236. This dismissal was reiterated in a letter dated 25 May 1936 from the British Political Resident to the Secretary of State for India:

"The map in question showed not only Qatar, but part of the neighbouring territory including the Islands of Bahrain, so that the fact of Hawar appearing on it is of course no proof of ownership one way or the other."³⁴⁸

(iv) The so-called 1936 British "Provisional Decision"

237. Having secured, with the intervention of the British Government, a concession in the territory over which the Ruler of Qatar ruled – undefined as that was – PCL set its sights, in January 1936, on the Bahrain unallotted area concession.³⁴⁹

238. As discussed above, in the first round of negotiations, Britain had succeeded in ensuring that the Hawar Islands could not be included in the definition of the Bahrain unallotted area concession; the principal motive for Britain's efforts was the fact that the applicant had been the American-owned BAPCO. As the second round of negotiations for the unallotted area got underway, the Ruler of Bahrain was keen to ensure that there

³⁴⁷ Letter from J.C. Walton (India Office) to J. Skliros (PCL), 14 May 1936. BM Ann. 248, Vol. 5, p. 1076.

³⁴⁸ Express Letter from the British Political Resident to the Secretary of State for India, 25 May 1936. QM Ann. III.107, Vol. 7, p. 31.

³⁴⁹ Letter from T.C. Fowle, British Political Resident, to M.J. Clauson, India Office, 4 January 1936. Ann. 71, Vol. 2, p. 232.

would be no misunderstanding regarding the prospective concession area. He thus insisted that the concession area which was to form part of the Bahrain unallotted area should be defined so as to reflect his sovereignty over the Hawar Islands.

239. The implications of the Ruler of Bahrain's assertion of sovereignty over the Hawar Islands were not lost on PCL. If the Hawar Islands were considered to be part of Qatar, then their concession rights would automatically fall to PCL by virtue of the Qatar Concession. If, on the other hand, they were considered to be part of Bahrain, PCL would find itself confronted with stiff competition from BAPCO for what was considered to be an area with significant oil potential.³⁵⁰ Accordingly, PCL's Managing Director formally requested that the British Government state its view on the question of sovereignty over the Hawar Islands, making it clear that PCL considered the Islands to be part of Qatar. In support of PCL's position, the Managing Director invoked the 1935 Qatar Concession and the map attached thereto. The irrelevance of this map as support for Qatar's claims to the Hawar Islands has already been demonstrated above (see paragraphs 230 to 236 above).³⁵¹

240. PCL also went so far as to warn the British Government that it would be prepared to instigate a territorial dispute over the Hawar Islands if it did not obtain the concession rights to them. PCL's position is reflected in a report submitted by Captain T. Hickinbotham, the British Political Agent (officiating), on a conversation held with Major Frank Holmes, by then PCL's local representative:

"Major Holmes stated that if the Bahrain Government claimed Hawar then the Qatar concessionaires would probably maintain that it was included under the Qatar Concession and protest against the Shaikh of Bahrain's claim. A claim to the Islands ['s' added in manuscript] by the

³⁵⁰ Letter from Captain T. Hickinbotham, Officiating British Political Agent to the British Political Resident, 9 May 1936 ("... the ownership of the Hawar group is of great importance because it is directly in what Major Holmes called the oil 'line'"). Ann. 73, Vol. 2, pp. 236-237.

³⁵¹ Letter from J. Skliros (PCL) to J.C. Walton (India Office) of 29 April 1936. QM Ann. III.104, Vol. 7, pp. 19-21.

Shaikh would probably bring the Bahrain Petroleum Company Limited into the field in competition with Petroleum Concession Limited for the Concession at present being negotiated here by him. He also said that if Petroleum Concessions Limited obtained the present concession then the question of ownership of the Island in question would not be brought up by them. I gathered that he was suggesting that if Petroleum Concessions Limited obtained the concession they are negotiating here a possibly difficult question of territorial rights would be avoided."³⁵²

241. Hickinbotham's report is noteworthy for a second reason: it highlights the fact that any protest against the Ruler of Bahrain's sovereignty over the Hawar Islands would be made at PCL's instigation. No mention is made of the Ruler of Qatar.

242. It was in this context that, on 28 April 1936, Charles Belgrave, the Adviser to the Bahrain Government, wrote to the British Political Agent in Bahrain:

"In connection with the present negotiations for an oil concession over the territory of Bahrain which is not included in the 1925 oil concession, I have the honour to inform you that the [Ruler] has instructed me to state to you that the Hawar group of islands lying between the southern extremity of Bahrain island and the coast of Qatar is indisputably part of Bahrain."

"His Excellency has frequently mentioned this fact to His Britannic Majesty's Political Agent in Bahrain and he wishes to remind you that he informed you that Hawar belonged to Bahrain when accompanied by Shaikh Abdullah bin Isa Al-Khalifa and myself he called on you on 18th April 1936 to discuss the question of a new oil concession. As he regards his sovereignty over the Hawar islands which includes one of the largest islands belonging to Bahrain of great importance he considers that the fact should be stated officially in writing."³⁵³

243. In view of PCL's request for an "advisory opinion" regarding the ownership of the Hawar Islands, the British Government investigated the matter. On 6 May 1936, Loch, who was still the British Political Agent, submitted a report on the issue to Sir

³⁵² Letter from Capt. T. Hickinbotham, Officiating British Political Agent to the British Political Resident, 9 May 1936. Ann. 73, Vol. 2, pp. 236-237.

³⁵³ Letter from Charles D. Belgrave, the Adviser to the Government of Bahrain, to the British Political Agent, 28 April 1936. QM Ann. III.103, Vol. 7, p. 15.

Trenchard Fowle, the British Political Resident. On the basis of the evidence available to him at the time, the British Political Agent concluded:

"I am inclined to think there is real substance in Sheikh Sir Hamad bin Isa's [the Ruler of Bahrain] claim."³⁵⁴

244. The British Political Agent clarified that he had not made any efforts to seek out the views of the Ruler of Qatar, principally, it would appear, because there seemed to have been no record of the Ruler of Qatar having ever asserted any sort of claim to the Hawar Islands:

"I do not know what Sheikh Abdullah bin Jasim of Qatar's views about the Islands are, but I have never heard any protest from him against the activities of Bahrain's subjects there."³⁵⁵

This, despite the involvement and interests of the Qatar concessionaire.

245. Additional evidence adduced by PCL, in support of its view that the Hawar Islands belonged to Qatar, was also submitted for the British Political Resident's consideration.³⁵⁶ What is notable in the evidence offered by PCL is the fact that no mention is made of any views held by the Ruler of Qatar on the subject of the sovereignty over the Hawar Islands. It is inconceivable that PCL, the Qatar concessionaire, should not have consulted the Ruler of Qatar, who would have been the beneficiary of payments by PCL if the Islands belonged to him and contained oil. The absence of any mention of the Ruler's views can only be explained by the fact that the

³⁵⁴ He went on to say that it might in certain circumstances suit the British politically to have as large an area as possible included under Bahrain. The British Political Agent, however, gave no reasons in support of his suggestion and British records contain no indication that it was ever given any consideration in Whitehall. Qatar's attempts to use the British Political Agent's comments to corroborate its allegations of British-Bahraini collusion are, therefore, utterly baseless. Letter from Lt. Col. Gordon Loch, British Political Agent, to the British Political Resident, 6 May 1936. BM Ann. 247, Vol. 5, p. 1074; QM Ann. III.106, Vol. 7, p. 27.

³⁵⁵ *Ibid.*

³⁵⁶ Note entitled "Hawar Islands" from the India Office to the British Political Resident Persian Gulf, undated, with enclosure entitled "Note on 'Hawar' Island" submitted by S.H. Longrigg (PCL), 29 April 1936. Ann. 72, Vol. 2, pp. 233-235.

Ruler of Qatar had nothing to say on the subject. Indeed, as discussed in Bahrain's Memorial at Section 3.3.B, based on the Ruler's description in 1939 of where he considered the Hawar Islands to be located indicated that he was unaware of where the Islands were.

246. The British Political Resident now had before him a detailed statement of the evidence on which the Ruler of Bahrain based his claims of sovereignty over the Hawar Islands, the evidence considered to be relevant to the issue (in the form of the PCL Managing Director's letter and a separate report submitted by PCL), and the results of the British Political Agent's investigations. In a letter dated 25 May 1936, to the Secretary of State for India, the British Political Resident set out his analysis of the available evidence and on that basis endorsed the view that the Ruler of Bahrain was entitled to sovereignty over the Hawar Islands:

"It is convenient to deal first with the statement in the first paragraph of [PCL's Managing Director's] letter ... that the fact of the Island of Hawar being shown on the map annexed to the Qatar Oil Concession is proof that the Island belongs to Qatar. The map in question showed not only Qatar, but part of the neighbouring territory including the Islands of Bahrain, so that the fact of Hawar appearing on it is of course no proof of ownership one way or another.

....

... it is beyond doubt that the [Hawar] Island has long been occupied by the Dowasir tribe of Bahrain (vide paragraph 7 of Letter No. 207 dated 4th April 1909 from the Political Agent, Bahrain to the Political Resident ... and the reference to the Gazetteer of the Persian Gulf ...), and it appears beyond doubt that the present Shaikh of Bahrain's father (who succeeded in 1869) and the Shaikh himself have exercised active jurisdiction in Hawar down to the present day (vide paragraphs 4-6 of Letter no. C/180 dated 28th April 1936 from the Adviser to the Government of Bahrain to the Political Agent, Bahrain), apparently without interference or protest by the Shaikh of Qatar."³⁵⁷

³⁵⁷ Lt. Col. T.C. Fowle, British Political Resident, to the Secretary of State for India, 25 May 1936. QM Ann. III.107, Vol. 7, p. 31.

247. He went on to conclude that:

"In all the circumstances of the case, I incline to the view that Hawar should be regarded as belonging to the Shaikh of Bahrain and that the burden of disproving his claim lies on the Shaikh of Qatar. We have heard nothing on the subject from the Shaikh of Qatar, and it is quite possible that he may not dispute the claim of the Shaikh of Bahrain."³⁵⁸

248. Fowle, however, felt it necessary to highlight the implications of his findings:

"The decision as to the ownership of Hawar may, according to Major Holmes, affect the future activities of [BAPCO] as, if it is awarded to Bahrain, that Company may think it worth while to compete with [PCL] for the remaining area."³⁵⁹

249. The British Political Resident's warnings regarding BAPCO were not misplaced.

On 20 June 1936, BAPCO confirmed its interest in negotiating for the unallotted area.³⁶⁰

The Foreign Office did not hide its concern regarding BAPCO's entry into the race:

"H.M.G. would certainly prefer that P.C.L. should get this concession, but they would raise no objection to [BAPCO] securing it subject to their receiving the necessary political safeguards and to their being convinced that the concession was in the best interests of the Sheikh."³⁶¹

250. The India Office also supported a strategy of exerting pressure on the Ruler of Bahrain to award the unallotted area concession to PCL:

"... [His Majesty's] Government may consider it desirable to suggest to the Sheikh that it might be a good thing to give the remainder of the concession to Bahrain to [PCL]. Once BAPCO gets the whole area it will probably increase the difficulty of any arrangement being entered into between Standard Oil of California and the other big groups (which

³⁵⁸ *Ibid.*

³⁵⁹ *Ibid.*

³⁶⁰ Telegram from the British Political Agent to the British Political Resident, 20 June 1936. Ann. 74, Vol. 2, p. 238.

³⁶¹ Foreign Office Minute, 26 June 1936. Ann. 75, Vol. 2, p. 239.

really means the Iraq Petroleum Company) over this territory with the object of securing a measure of British control."³⁶²

251. On 9 July 1936, an inter-departmental meeting was held at the India Office in London, involving representatives of the Foreign Office, Petroleum Department, Admiralty and the India Office, to consider the issue of the ownership of the Hawar Islands.³⁶³ Despite the clear incentive to find in favour of the Ruler of Qatar now that BAPCO had expressed its interest in the unallotted area, the British Political Resident's conclusions were adopted as the official view of the British Government:

"The meeting first examined the question of the ownership of the Hawar Islands. It was agreed that on the evidence at present available these Islands appear to belong to the Sheikh of Bahrein, and that the burden of disproving his claim lay on any other potential claimants. It was agreed that the Sheikh of Bahrein should be informed accordingly."³⁶⁴

252. The implications of this decision were not lost on the Petroleum Department:

"Mr. Starling [of the Petroleum Department] then suggested that His Majesty's Government should exert a sub rosa influence to induce the Sheikh to give the concession for the unallotted area to [PCL]. He said that he hoped that United States concerns would gradually disappear from the Gulf and that the whole area would fall under British control."³⁶⁵ (Emphasis added.)

253. The Ruler of Bahrain was informed of the British Government's opinion through his Adviser, Charles Belgrave. Britain, however, was very careful to point out that the opinion being expressed was only provisional, and that no final determination on the

³⁶² Letter from F.C. Starling, Petroleum Department to M.J. Clauson, India Office, 3 July 1936. Ann. 76, Vol. 2, pp. 240-242.

³⁶³ Minutes of a meeting held at the India Office, 9 July 1936. Ann. 77, Vol. 2, pp. 243-245.

³⁶⁴ *Ibid.*

³⁶⁵ *Ibid.* The underlined text was later deleted and replaced with the following:

"if the [PCL] could secure the remainder of Bahrain, it might give them a better chance in any renewal of negotiations to acquire the Standard of California's interests in the Gulf, thus strengthening the British position in the area."

matter of sovereignty over the Hawar Islands would be possible until the views of the Ruler of Qatar had been heard:

"Mr. Clauson and I saw Mr. Belgrave on 10th July, and explained to him the position in regard to Hawar, viz., that on the evidence before H.M.G. it appears to belong to the Sheikh of Bahrain, and that the burden of disproving his claim lies on any other potential claimant. It was explained to him that it would be impossible to give a final ruling without knowing whether the Sheikh of Qatar has a claim, and hearing it if he has one. Mr. Belgrave understood the position. He said that the Sheikh would enter the island in the list of his possessions to be given to [PCL]."³⁶⁶

254. The same proviso was conveyed to PCL:

"It is important that the Company should clearly understand that [Britain's] position is as stated in the last sentence [of the India Office's letter to PCL dated 14 July 1936], namely, that on the basis of the evidence at present before them it appears to them that Hawar belongs to the Sheikh of Bahrain and the burden of disproving his claim would lie on any other potential claimant ... confirm that the Company appreciate the limited nature of the decision given by [Britain] in regard to this group of islands."³⁶⁷

255. Notwithstanding Britain's concern to ensure that any claim by the Ruler of Qatar be given a full and fair hearing, it was clear to all parties that the oil concession negotiations with the Ruler of Bahrain were to proceed on the understanding that the Hawar Islands were included within the territories of Bahrain.³⁶⁸

256. In May 1937, the Ruler of Bahrain decided to postpone negotiations for the unallotted area concession in order to focus his attention on the crisis developing in

³⁶⁶ Minute by the India office, 14 July 1936. QM Ann. III.111, Vol. 7, p. 51.

³⁶⁷ Letter from M.J. Clauson, India Office, to S.H. Longrigg, PCL, 14 September 1936. Ann. 79, Vol. 2, p. 248.

³⁶⁸ Letter from C. Dalrymple Belgrave to Hood, 18 July 1936. Ann. 78, Vol. 2, pp. 246-247. Letter from J.C. Walton (India Office) to F.C. Starling (Petroleum Department), 30 July 1936. QM Ann. III.112. Telegram from Sir Trenchard Fowle, British Political Resident, to Secretary of State for India, London, 12 February 1937. Ann. 80, Vol. 2, pp. 249-250.

Zubarah. Negotiations recommenced in January 1938, setting in motion the events that would ultimately lead to the British Arbitration concerning the sovereignty of the Hawar Islands.

257. As discussed in Sections 3.3, 3.4 and 3.5, below, in questioning the propriety of the 1939 British decision, Qatar argues that throughout the proceedings Qatar was treated as the claimant as a result of a "provisional decision" by Britain in 1936 that the Hawar Islands belonged to Bahrain. This alleged tilt, Qatar contends, was motivated by British bias and was based on an improper consideration of the available evidence. Contrary to Qatar's assertions, all that the British Government had done in 1936 was to give an advisory opinion in the context of negotiations between the Ruler of Bahrain and PCL for an oil concession. In so doing, Britain simply confirmed a historical reality of which it was already aware. This opinion had very little significance for the formal arbitration that was to take place in 1939.

258. Qatar suggests that "political considerations" may also have influenced the British Government's decision. This suggestion cannot sensibly be supported. After BAPCO's entry into the negotiating framework, if "political considerations" had been Britain's principle motive, Britain would clearly have favoured granting Qatar sovereignty over the Islands. This would have meant that PCL would automatically have gained the concession rights to the Islands under its 1935 Qatar Oil Concession. Britain's decision in 1936, like its arbitration two years later, was based on an objective evaluation of the evidence of the exercise of Bahraini sovereignty over the Hawar Islands.

259. It is also clear from the foregoing that the British Political Agent and the British Political Resident investigated the matter as thoroughly and objectively as was required by the circumstances. PCL had requested an advisory opinion from the British Government in the context of on-going negotiations for the Bahrain unallotted area concession, so that it could be certain it knew what areas it was negotiating for with the

Ruler of Bahrain. Qatar's Memorial complains at paragraph 6.37 that "no attempt was made by [either the British Political Agent or British Political Resident] to inform the Ruler of Qatar that a claim to Hawar had been advanced on behalf of Bahrain"³⁶⁹ In the circumstances, there was no reason for Britain to consult with the Ruler of Qatar, nor to report to him the findings that had been made. The issue had been raised by PCL, not by the Ruler of Qatar.

(v) The British decision regarding sovereignty over the Hawar Islands

260. Negotiations for the Bahrain unallotted area concession recommenced in early 1938. Before their suspension, the Ruler of Bahrain had decided to divide the Bahrain unallotted concession area between BAPCO and PCL.³⁷⁰ The scheme of division gave to PCL those areas in which it was most interested, namely the Hawar group of islands, Fasht al Jarin, Khor Fasht and Fasht ad Dibal, as well as a number of other smaller islands and reefs. PCL therefore renounced its attempt to secure concession rights over the entire Bahrain unallotted area.

261. Obtaining the concession rights to the whole of the Bahrain unallotted area, however, remained BAPCO's goal, as recorded in the following Note by an India Office official:

"[BAPCO] would be quite content to see no concession given for the rest of the Sheikh's territory but if one were given they were anxious to obtain the whole of the unallotted area, since they thought it would be regrettable if two companies were operating side by side in so small an area."³⁷¹

³⁶⁹ QM para. 6.37, p. 101.

³⁷⁰ Letter from H.R. Ballantyne (BAPCO) to Charles D. Belgrave, Adviser to the Government of Bahrain, 5 October 1936. QM Ann. III.114, Vol. 7, p. 65.

³⁷¹ Note by J.P. Gibson, India Office, 7 April 1938. Ann. 84, Vol. 2, pp. 262-263.

262. PCL obtained Britain's approval to press forward with its negotiations with the Ruler of Bahrain for those concession areas included within its sub-division.³⁷² This again brought to the fore the issue of whether the Hawar Islands belonged to the Ruler of Bahrain, and as such, could be granted as part of the Bahrain unallotted area concession.

263. As discussed above, in giving its 1936 "advisory opinion" regarding Bahrain's ownership of the Hawar Islands, Britain had been careful to point out that a final ruling would not be possible until it had been ascertained whether the Ruler of Qatar had a claim, and hearing it if he did. Contrary to Qatar's claims, it was clear that Britain had on no previous occasion made a formal ruling on the question:

"Hitherto no attempt has been made to determine the sovereignty of the islands in question as between Bahrein and Qatar; but in view of the manner in which it has been raised by [PCL], a decision cannot be delayed further...."³⁷³

264. Although Britain would have preferred to avoid the issue,³⁷⁴ this was no longer possible:

"Now, however, that the P.C.L. want to commence negotiations with the Sheikh concerning this area in which Hawar is situated, H.M.G. will have to give a decision as the Company will want to know before entering on negotiations whether Hawar does or does not belong to Bahrein."³⁷⁵

265. Britain was also concerned to ensure that the Ruler of Qatar be given a full and fair opportunity to air whatever claims he may have had:

³⁷² Letter from R. Peel, India Office, to S.H. Longrigg, PCL, 29 April 1938. Ann. 85, Vol. 2, pp. 264-266.

³⁷³ Note by A.C.B. Symon, 4 April 1938. Ann. 83, Vol. 2, pp. 260-261.

³⁷⁴ Note to A.C.B. Symon from T.C. Fowle, 5 April, 1938. BM Ann. 254, Vol. 5, p. 1090; QM Ann. III.146, Vol. 7, p. 233.

³⁷⁵ *Ibid.*

"... it is only fair, I think, to Qatar, to give him an opportunity of having his say."³⁷⁶

266. In February 1938, the British Political Agent contacted the Ruler of Qatar to ascertain whether he wished to put forward a formal claim to the Hawar Islands, and had ascertained that, at that time, he did not.³⁷⁷ By May 1938, however, the negotiations between PCL and the Ruler of Bahrain had progressed considerably, and the prospect of an agreement being reached between the parties seemed all the more likely. Thus, on 10 May 1938, following yet another visit from the British Political Agent to urge him to submit a claim, Sheikh Abdullah of Qatar submitted the first of two letters that constituted his claim to the Hawar Islands.³⁷⁸

267. Given the need for a prompt decision on the question due to the on-going oil concession negotiations, the British Political Resident issued instructions to expedite the processing of Qatar's claim.³⁷⁹ The British Political Agent responded to the Ruler of Qatar's letter, emphasising the urgency with which the matter had to be addressed and the need for the Ruler to submit evidence supporting his claim of sovereignty over the Hawar Islands:

"It is indeed a fact that by their formal occupation of the Islands for some time past the Bahrain Government possess a prima facie claim to them ... even so [Britain] will be prepared to give the fullest consideration to any formal claim put forward by you to the Hawar Islands, provided that your claim is supported by a full and complete statement of the evidence on which you rely in asserting that you, as Sheikh of Qatar, possess

³⁷⁶ *Ibid.*

³⁷⁷ Copy of Express Letter No. C/312 from the British Political Agent, to the British Political Resident in the Persian Gulf, Bushire, 15 May 1938. BM Ann. 257, Vol. 5, p. 1096; QM Ann. III.152, Vol. 7, p. 261.

³⁷⁸ Translation of a letter dated 10th Rabi al Awwal 1357 from Shaikh Abdulla bin Qasim Al-Thani, Ruler of Qatar, to Hugh Weightman, British Political Agent, 10 May 1938. This letter was officially provided to the Bahrain Government under cover of the British Political Agent's letter 20 May 1938. BM Ann. 256, Vol. 5, p. 1094; QM Ann. III.150, Vol. 7, p. 253.

³⁷⁹ Telegram from British Political Resident, to British Political Agent, 19 May 1938. QM Ann. III.153, Vol. 7, p. 267.

Islands (assuming, of course, that Bahrein sovereignty over them is recognised by H.M.G.)³⁸⁶

274. Accordingly, the Ruler of Bahrain was encouraged not to take any final decision on the awarding of the concession and to give PCL an opportunity to re-state its case.³⁸⁷

275. PCL seized the opportunity that had been created for it. Playing on the Ruler of Bahrain's fears, it emphasised that awarding the entire unallotted area concession to BAPCO would have serious implications for the Ruler's relations with the British Government.³⁸⁸ The British Political Resident supported the British Government's intervention on PCL's behalf:

"I am definitely of the opinion that His Majesty's Government's declaration to Shaikh that Hawar should be allotted to P.C.L. should be conveyed to him now rather than later when Shaikh may have informed B.P.C. that it is included in their area which is likely to happen If we wait till that stage our intervention will it seems to me be much more awkward."³⁸⁹

276. Concerned by the possibility of losing British protection, the Ruler of Bahrain sought assurances from the British Government:

"Before submitting our opinion to you regarding the two offers for Additional Area we wish to enquire whether British Government has any political objection to our granting a concession to [BAPCO] extending over our whole territory. Our reason for enquiries is because we are being informed from certain quarters that such action would seriously injure our friendship with the British Government."³⁹⁰

³⁸⁶ Draft India Office Paper prepared by R. Peel, 8 November 1938. Ann. 91, Vol. 2, pp. 275-278.

³⁸⁷ Telegram from Secretary of State for India to British Political Resident, 16 December 1938. Ann. 92, Vol. 2, pp. 279-281.

³⁸⁸ Decypher of telegram from British Political Agent, to Political Department, India Office, 8 January 1939. Ann. 93, Vol. 2, p. 282.

³⁸⁹ Telegram from British Political Resident, to Secretary of State for India, London, 9 January 1939. Ann. 94, Vol. 2, p. 283.

³⁹⁰ Decypher of telegram to British Political Resident, repeated to India Office, from the British Political Agent, 11 January 1939. Ann. 95, Vol. 2, p. 284.

277. The British Government assured the Ruler that there was no risk of his losing Britain's goodwill, and that there was no connection between the Ruler's decision on the oil concession and the issue of his claim to the Hawar islands.

"[His Highness] may be assured that whatever conclusions he arrives at as a result of negotiations this will not affect goodwill of His Majesty's Government. His Majesty's Government think however that it may be convenient for His Highness at this stage of negotiations to inform him of their views in regard to one portion of area namely the Hawar islands. Owing to the contiguity of these islands to Qatar where an oil concession is being operated by P.C.L. the grant of concessional rights to B.P.C. in Hawar would be open to objection and [the British Government] consider that it would be appropriate at least to allow P.C.L. the opportunity to acquire concessional rights therein. His Highness should however be assured that in informing him of their views in regard to a grant of a concession in Hawar [Britain] are not in any way prejudicing the question of sovereignty over Hawar islands. The choice of P.C.L. rather than B.P.C. as concessionaires could not affect adversely his claim to the islands."³⁹¹

278. Britain appeared to believe that PCL still had a chance to win the Hawar Islands concession, in part because it was convinced that the Ruler of Bahrain would not want to lose Britain's goodwill.

279. The Ruler of Bahrain was encouraged by these assurances. BAPCO had meanwhile increased the value of its offer. After evaluating the offers it had received from both BAPCO and PCL, the Bahrain Government decided that the offer made by BAPCO would be in Bahrain's long-term interests.³⁹²

280. Britain could not deny the advantages that would accrue to Bahrain from the BAPCO concession, even though it recognised the geopolitical considerations that weighed against agreeing to such a concession:

³⁹¹ Telegram from Secretary of State for India, London, to British Political Resident, 14 January 1939. Ann. 96, Vol. 2, p. 285.

³⁹² Letter from Sheikh Hamad bin Isa Alkhalifah to the British Political Agent, 6 February 1939. Ann. 97, Vol. 2, pp. 287-294.

"However much weight the arguments [*i.e.*, commercial and geopolitical considerations favouring a grant of the Hawar Islands concession to PCL] set out ... may carry one way or another, the essence of the existing situation is that [BAPCO's] offer is made dependent on their obtaining the entire Unallotted Area. This being the case, and since the details of the present negotiations must inevitably become public property, it is scarcely too much to say that the grant of a concession for Hawar to [PCL] under the advice of [Britain] will be as disastrous to the prestige and position of [the British Government] in Bahrain and in this part of the Gulf generally as to the Shaikh and his administration[I]t requires little imagination therefore to realise the devastating effect of the almost inevitable comment, if [the British Government] insist on Hawar going to [PCL], – 'the British have served their own interests at the cost of 1 1/2 million pounds to the Shaikh of Bahrain'. The effect of hostile propoganda, overt and covert, which might be based on such a statement is incalculable."

"It is distasteful to be compelled to recommend the withdrawal of the support hitherto afforded to a partially British Company in its attempts to obtain a footing in Bahrain. Nevertheless it seems inevitable to me that commercial advantages must yield to the over-riding interests of His Majesty's Government and of the Bahrain State."³⁹³

281. Britain realised that its hands were tied. One avenue still remained open. As yet no formal decision had been issued as to which of the two Rulers possessed sovereignty over the Hawar Islands. The Secretary of State for India wrote to the British Political Resident reminding him that the sovereignty issue remained open:

"It would seem to be necessary, if [Britain] were to approve of concession over whole of unallotted area being given to [BAPCO], to warn both the Sheikh and the Company that the question whether the Hawar Islands are included in the concessional area depends on whatever decision is eventually given by [Britain] regarding the sovereignty over the islands, and that consequently no operations could be commenced in Hawar pending such decision In the circumstances, however, it would seem highly desirable that an early decision should be reached on the question of sovereignty over the Hawar Islands If [the Sheikh of

³⁹³ Express Letter from British Political Agent to British Political Resident, Bahrain, 12 February 1939 at p. 6. Ann. 98-99, Vol. 2, pp. 295-302.

Qatar] has not yet replied he might be asked to submit his reply within such further short period as you think reasonable."³⁹⁴

282. It was therefore considered appropriate that any agreement between BAPCO and the Ruler of Bahrain include a caveat to the effect that the concession was subject to the British Government's decision concerning sovereignty over the islands.³⁹⁵

283. In addition, before it had even informed either the Ruler of Bahrain or BAPCO, the British Government informed PCL that it was going to approve the BAPCO concession agreement.³⁹⁶ It was pointed out to PCL that the British Government's decision to permit the Ruler of Bahrain to grant the concession to BAPCO was "... subject, of course, as regards the Hawar Islands, to the question of sovereignty over the Islands being eventually decided in the Sheikh's favour."³⁹⁷

284. On 22 April 1939, the British Political Agent submitted his final analysis and evaluation of the evidence that had been submitted by the respective Rulers of Qatar and Bahrain. He summarised his findings as follows:

"The Shaikh of Qatar has produced no evidence whatsoever. He relies solely on an uncorroborated assertion of sovereignty, on geographical propinquity and on the alleged statements of unidentified persons. On the Bahrain side there is evidence that the original occupation of Hawar by the Dawasir was effected under the authority of the Al Khalifah, that the Zellaq Dawasir have frequented these islands for a great number of years, that the courts established by the Shaikhs of Bahrain have promulgated decisions in regard to disputes over property there, that questions of ownership of fish traps have been submitted to the decision of the Bahrain Shara Court, that seven years ago Bahrain processes were served in Hawar, that the boats owned by the Dawasir of Hawar are

³⁹⁴ Express Letter from Secretary of State, India, to British Political Resident in the Persian Gulf, 1 March 1939. QM Ann. III.183, Vol. 7, p. 417.

³⁹⁵ Letter from Military Branch, Admiralty to R.T. Peel, India Office, 31 March 1939. Ann. 100, Vol. 2, pp. 303-305.

³⁹⁶ Letter S.F. Stewart to Lord Cadman (PCL), 14 April 1939. Ann. 101, Vol. 2, pp. 306-308.

³⁹⁷ *Ibid.*

registered in Bahrain and that gypsum or juss is excavated from Hawar under licence from the Bahrain Government."³⁹⁸

285. In furtherance of British geopolitical and commercial interests, Britain could still have found in favour of the Ruler of Qatar, which would have resulted in PCL gaining the Hawar Islands concession by default. However, the Ruler of Qatar had submitted no evidence in support of his claim, while the Ruler of Bahrain had submitted a wealth of evidence demonstrating Bahrain's historical sovereignty over the Islands.

286. By mid-June 1939, the British Government had considered the views put forward by the British Political Agent and decided internally that the Hawar Islands belonged to Bahrain. Before the decision was formally issued, PCL made a last-ditch effort to convince the British Government that it should consider awarding the Islands to Qatar.³⁹⁹

287. The weight of the evidence, however, was clearly in favour of Bahrain. On 11 July the Rulers of Bahrain and Qatar were informed that after having given the matter careful consideration, Britain had decided that the Hawar Islands belonged to Bahrain and not to Qatar.⁴⁰⁰ The British award of 1939 thus confirmed the historical fact of Bahrain's sovereignty over the Hawar Islands.

³⁹⁸ Letter from H. Weightman, British Political Agent, to the British Political Resident in the Persian Gulf, 22 April 1939. BM Ann. 281, Vol. 5, p. 1165; QM Ann. III.195, Vol. 7, p. 497.

³⁹⁹ Letter from Managing Director of PCL to the Under Secretary of State for India, 30 June 1939. BM Ann. 285, Vol. 5, p. 1178; QM Ann. III.206, Vol. 8, p. 27.

⁴⁰⁰ Letter from British Political Resident to Ruler of Bahrain, 11 July 1939. BM Ann. 287, Vol. 5, p. 1182; QM Ann. III.208, Vol. 8, p. 37. Letter from British Political Resident to Ruler of Qatar, 11 July 1939. BM Ann. 288, Vol. 5, p. 1183; QM Ann. III.209, Vol. 8, p. 41.

H. Prior's and Alban's criticisms of the 1939 Award were hasty, unfounded, and disproved

288. In its efforts to impugn the 1939 British decision awarding the Hawar Islands to Bahrain, Qatar places considerable weight on the views expressed by Lt. Col. Geoffrey Prior, who succeeded Sir Trenchard Fowle as British Political Resident, and Prior's subordinate, Major R.G.E. Alban, who succeeded Sir Hugh Weightman as British Political Agent in Bahrain. Qatar relies on statements made by Prior and Alban, taken – as usual – out of context, in order to buttress its allegations of British bias and collusion with Bahrain to steal the Hawar Islands from Qatar.⁴⁰¹ Qatar's Memorial alleges:

"What is remarkable in this story is that both Prior ... and Alban ... should have expressed such unease and disquiet about the correctness of the British decision of 1939 on the Hawar islands. They did not particularise their unease and disquiet by pointing to specific procedural irregularities, but it is clear that both of them were anxious to have the decision re-opened; and the refusal of the British officials to re-open it in 1941 was attributed not so much to a firm belief on the part of Caroe that Fowle and Weightman were right, but rather to the political undesirability, if not impracticability, of reversing the decision made in 1939."⁴⁰²

289. Qatar's charges of British bias have been refuted in their entirety in Section 3.5.(A). Leaving aside the forged Qatari documents, which constitute the sole evidence for Qatar's conspiracy theory, it is easily demonstrated that, viewed in their proper context, Prior's statements reflected nothing more than his tentative, personal opinion, expressed on the basis of unverified, inaccurate and incomplete information, which was immediately discredited and properly ignored by senior British officials. As such, Prior's statement can be accorded no weight. In addition, Qatar's attempts to use Prior's

⁴⁰¹ QM paras. 6.100 to 6.109, pp. 125-129.

⁴⁰² QM para. 6.137, p. 139.

and Alban's views to corroborate the substance of the allegations "evidenced" by the forged documents must be disregarded in their entirety.

290. Lt. Col. Geoffrey Prior was appointed as the British Political Resident in Bushire in September 1939 and held this post until May 1946. He appears to have believed that the Hawar Islands rightfully belonged to Qatar and not to Bahrain, and therefore that the British authorities had erred in awarding the Islands to Bahrain. In this respect, Prior disagreed with Sir Hugh Weightman, who had served as the British Political Agent in Bahrain for 3 years (October 1937 until October 1940) and who had thoroughly investigated and commented on the claims advanced by both parties; with Sir Trenchard Fowle, the British Political Resident in Bushire for over 7 years, who had examined and accepted the views of Weightman; and the British and Indian Governments, which had given effect to the British Political Agent's views on the basis of the British Political Resident's recommendation.

291. It fell to Prior, soon after his appointment as British Political Resident, to reconfirm the 1939 Award to the Ruler of Qatar. On 25 September, 1939, Prior wrote a partly illegible file note stating:

"I have little doubt that a grave miscarriage of justice has occurred, and I am not surprised that my predecessor wanted the case to be put up after he handed over. It is too late to do anything now and the Shaikh can only be informed that H.M.G. have already passed final orders and that the matter cannot be reopened."⁴⁰³

292. There are no records of Prior having reported his personal opinions to his superiors either at that time or after he received a further letter dated 18th November from the Ruler of Qatar regarding the 1939 decision.

⁴⁰³ Manuscript minutes by Political Residency, August-September 1939. QM Ann. III.212, Vol. 8, p. 53.

293. Prior's first official expression of his views came in the context of his response to a letter he had received from the Secretary of State dated 12 March 1940, requesting his views on the line of division between Bahrain and Qatar.⁴⁰⁴

294. In his response, some three months later, Prior concluded:

"I have grave doubts regarding justice of decision in Hawar Islands case and am raising question after making further inquiries."⁴⁰⁵

At the same time, Prior directly attacked Weightman's role in the matter:

"It is ridiculous to suppose that territory can be acquired in these waters by the erection of 'national marks' and it is unfortunate that the Political Agent did not report it before."⁴⁰⁶

295. Weightman, who was still British Political Agent, rose swiftly to the challenge to refute Prior's allegations that he had failed to report the erection of beacons to Fowle and Prior's insinuation that he had lacked complete impartiality.

"The fact that Bahrain had erected national marks on all islands or islets to which they laid claim was fully known to the Political Resident at the time when he despatched his Express Letter ... dated the 7th May 1938. ... I would request therefore that if you see no objection the suggestion of an important omission on my part conveyed in your telegram under reference may be removed."⁴⁰⁷

296. Weightman went on to state that his views had been in accordance with Britain's official policy regarding the methods for establishing sovereignty over territory. Prior tried to evade the issue, thus prompting Weightman to express his views on the matter more fully:

⁴⁰⁴ Express Letter from R. Peel, India Office, to British Political Resident, Persian Gulf, 12 March 1940. QM Ann. IV.58, Vol. 9, p. 283.

⁴⁰⁵ Telegram from British Political Resident, to Secretary of State for India, London, 7 June 1940. QM Ann. III.220, Vol. 8, p. 89.

⁴⁰⁶ *Ibid.*

⁴⁰⁷ Express Letter from British Political Agent, to British Political Resident, 13 June 1940. Ann. 105, Vol. 2, pp. 328-329.

"I feel that I should pursue the matter for the following reason. In the second paragraph of your telegram ... dated the 7th June 1940 there is reference to my failure to report action taken by the Bahrain Government, while in the last paragraph doubt is thrown on the justice of the decision in the Hawar case which was based on a factual report submitted by me. Since in both cases – as indeed also in my assumption that the erection of a national mark constitutes a valid method of claiming sovereignty in unoccupied areas – the advantage goes to Bahrain, I fear that the inference might be drawn that there was some question of my entire impartiality."⁴⁰⁸

297. Following Weightman's more detailed response, there appears to be no records of any further action by Prior to press his case that the 1939 Award be re-examined or to question Weightman's recommendations which had led to that Award. It appears, in fact, that although Prior had raised the issue in the first place, he now hoped that it would become dormant. Despite Prior's silence, however, on 16 January 1941 the India Office requested a fuller expression of his views:

"Would you please refer to your telegram of the 7th June ... regarding the ownership of the islands, reefs and waters lying between Bahrein and Qatar. To prevent any misunderstanding I should perhaps let you know that before taking any further action in this matter we have been awaiting the fuller expression of your views which we assume you will send by mail in due course."⁴⁰⁹

298. Faced with the reminder, Prior had no alternative but to attempt to fashion a reasoned response. Prior finally replied to the India Office on 26 October 1941, over 10 months after having received the reminder and 16 months after he had first expressed his views. His response was based largely on a note prepared by Alban at Prior's request.

299. Alban had been appointed as British Political Agent only recently. His relative lack of knowledge and appreciation of regional affairs is reflected, as was shown in

⁴⁰⁸ Express Letter from British Political Agent, to British Political Resident, 3 July 1940. QM Ann. III.222, Vol. 8, p. 99.

⁴⁰⁹ Letter from R. Peel, India Office, to Lt. Col. G.C. Prior, British Political Resident Persian Gulf, 16 January 1941. Ann. 106, Vol. 2, p. 330.

Section 2.3.F above, in his complete lack of appreciation of the Dowasir tribe's connection with the Ruler of Bahrain. It is further reflected in Alban's comment that it is "possible to wade from Hawar to the mainland at low water."⁴¹⁰ Clearly Alban had never visited the Hawar Islands.

300. None of the five points which Alban put forward for Prior's consideration suggests that he had considered the matter seriously. Indeed, it is hardly likely that he would have had any opportunity to do so: on 23 October 1941 Prior had requested Alban to "have tabulated and shown to me on arrival any information you have been able to collect regarding Bahrain claim to Hawar Island".⁴¹¹ Prior sent his response to Peel on 26 October 1941, only three days after receiving Alban's information. In these circumstances, Qatar's evaluation that "The 1941 Note indeed is much more objective and fair-minded than any document produced by Weightman or Fowle ..." is baseless.⁴¹²

301. Relying largely on the Alban Note, Prior crafted his response to the India Office. It is apparent from Prior's response not only that Prior's views were provisional and tentative, but also that Prior was conscious that he possessed insufficient knowledge to state a definitive view on the issue (see, e.g., Prior's recommendation that a former British Political Agent, Daly, be asked to examine the matter). The bulk of Prior's two-and-a-half page letter consists of a purported refutation of the points raised in Belgrave's undated memorandum setting forth Bahrain's claim to the Hawar Islands, without any positive evidence supporting Prior's opinion that the 1939 decision was unfair. Prior did not comment on any of the "evidence" submitted by the Ruler of Qatar, on any of the evidence that must already have existed in the Residency files, or on Weightman's eight-

⁴¹⁰ Note by R.G.E. Alban, British Political Agent, "Ownership of Hawar", undated. QM Ann. III.228, Vol. 8, p. 123.

⁴¹¹ Telegram from British Political Resident, to British Political Agent, 23 October 1941. QM Ann. III.227, Vol. 8, p. 119.

⁴¹² QM para. 6.105, p. 127.

page analysis and evaluation of the competing claims put forward by the Rulers of Bahrain and Qatar.

302. A copy of Prior's letter of 26 October 1941 had been forwarded to Sir Olaf Caroe of the Government of India's External Affairs Department. On 19 November 1941 Caroe wrote to Peel, recommending, in essence, that the substantive views expressed in Prior's letter be disregarded:

"Where the local experts differ so markedly as in this case, it is difficult to adjudicate, and the Government of India are of the view that the only safe course is to follow Prior's own advice at the end of his letter and decide that it is now outside practical politics to reverse the decision made in 1939 and communicated to both Rulers."⁴¹³

303. It is clear that Caroe did not treat Prior's views lightly, and that he had investigated the background of the matter carefully:

"They have however consulted Weightman, whose report in his letter ... of the 22nd April 1939 forms the foundation on which the decision to allot the Islands to Bahrain was based and have ascertained that, as might be expected, he holds to the opinion he then gave. That report is certainly a considered document based on visits to the Hawar main Island itself, and it is reasonable to observe that the counter opinion now given is not related directly to it, but to the claims put forward by the Bahrein Adviser."⁴¹⁴

304. Caroe also examined the sources that Prior had relied on and evaluated the arguments that Prior had put forward:

"For the rest of the opinion now given appears to be founded mainly on two considerations (i) that the rights of Qatar to the Hawar Islands find endorsement in Lorimer and (ii) that the general view of independent Arabs, presumably (though it is not so stated) proceeding mainly from the theory of geographical propinquity, with the consequent power to exercise the attributes of sovereignty, is in favour of Qatar.

⁴¹³ Letter from O.K. Caroe, External Affairs Department, Government of India, to R. Peel, External Affairs Department, Government of India, 19 November 1941. QM Ann. III.230, Vol. 8, p. 133.

⁴¹⁴ *Ibid.*

On the first point the only reference traceable to Hawar in Lorimer is on page 1513 of Volume II of his Gazetteer of the Persian Gulf. Here Hawar is mentioned only as one of the Islands adjoining the Western Qatar coast, and there is no reference to sovereignty or proprietary rights except in so far as such can be deduced from the fact that, as is known already, the Dawasir tribe built cisterns and have houses at two places on the main island. By those who know the Arabs of the Persian Gulf the second point may possibly be held to override all logic, and Prior's opinion on such a point is entitled to great weight. But here also the Government of India cannot but think that, even in dealing with Arabs, it would be unwise to arrive at a decision on sovereignty or proprietary rights without full consideration of matters of use, occupancy and exercise of the attributes of sovereignty. On that point the weight of the evidence so far adduced would appear to be in favour of Bahrain."⁴¹⁵

305. There can be no questioning Caroe's analysis. It was based on an examination of the sources relied upon by Prior and of the other evidence that had been adduced in the 1938-1939 Arbitration. Qatar's sole response to Caroe's rebuttal of Prior's arguments is, yet again, to invoke its fraudulent documents. As these documents must be disregarded, Caroe's views stand unchallenged.

306. Aside from Caroe, other high-ranking British officials also dismissed Prior's views. A longhand annotation made by Peel on Caroe's 19 November letter to him states:

"I think we should certainly accept the G of I's [*i.e.*, Government of India's] view and let the matter rest. I cannot help feeling that the P.R. has to some extent allowed himself to be influenced by personal animosity against Messrs. Belgrave and Weightman."⁴¹⁶

307. Similarly, Rupert Hay (later Sir Rupert Hay), who had acted as British Political Resident from October 1941 until September 1942, and therefore, must have been familiar with Prior's letter of 26 October 1941, commented in June 1946 on the views held by Prior:

⁴¹⁵ *Ibid.*

⁴¹⁶ Handwritten annotation by R. Peel, External Affairs Department, Government of India, on O.K. Caroe's 19 November 1941 letter. Ann. 107, Vol. 2, pp. 331-332.

"The question of the ownership of the Hawar Islands was definitely decided in 1939 and it is outside practical politics to reverse that decision"⁴¹⁷

308. Contrary to Qatar's contentions, the historical record establishes that, far from being "anxious" for the 1939 decision to be re-opened, Prior and Alban were reluctant to pursue the matter. Indeed, Prior had put nothing forward that would have justified the British Government to re-examine its decision. The episode, however, confirms Britain's continuing recognition in the early 1940s of Bahrain's historical sovereignty over the Hawar Islands.

I. Janan Island is part of the Hawar Islands group and was awarded to Bahrain by the 1939 British Award

309. In its Memorial, Qatar asserts that Bahrain has no rights over the island of Janan.⁴¹⁸ Qatar appears to put forward four separate grounds to justify this assertion, and to support its claim of sovereignty over Janan.

310. First, Qatar's Memorial states that "in a slightly broader context, Janan can be seen as a component of the offshore topography and the nearshore dynamic system associated with the Qatar coast."⁴¹⁹ Bahrain does not contest the facts of the physical shape and location of the Hawar Islands which, in Bahrain's contention, include Janan Island. As discussed in Section 4.3 of Bahrain's Memorial and in Section 2.3.B of this Counter-Memorial, however, geographical proximity is irrelevant to the disposition of the sovereignty issues in the case at hand. It is therefore pointless for Qatar to refer to

⁴¹⁷ Express letter, W.R. Hay, British Political Resident, to Retaxandum, London, 4 June 1946. Ann. 108, Vol. 2, pp. 333-334.

⁴¹⁸ QM para. 7.11. As discussed in the Memorial, Janan and Hadd Janan refer to the two plateaux of the same structure, and are generally considered together as the single island of Janan.

⁴¹⁹ QM para. 7.3.

the unremarkable observation by the geographer Lorimer that Janan Island is an island on the "West side of Qatar".⁴²⁰

311. Second, Qatar relies on documents purporting to support its claim that the Ottomans and various Rulers of Abu Dhabi recognised "that Janan Island, as much as the whole group of the Hawar islands, is part of Qatar territory".⁴²¹ This assertion is based on forged documents and merits no further consideration.

312. Third, Qatar invokes "[m]ost of the reasons given in [its] Memorial to show that the Hawar islands belong to Qatar" as also applicable to Janan Island.⁴²² Bahrain has established with authentic and verifiable evidence, in both its Memorial and in this Counter-Memorial, the historical reality of its uninterrupted sovereignty over the Hawar Islands from the 18th Century until the present day. In contrast, other than documents that are demonstrably fraudulent, Qatar has presented no evidence of any acts of sovereignty over the Hawar Islands, including Janan Island.

313. Fourth, Qatar claims that Britain "decided" in 1947 to award Janan Island to Qatar.⁴²³ This argument will be the focus of this section. As will be shown, Britain has never made such a decision regarding Janan Island, whether in 1947, or at any other time. To the contrary, Britain did recognise Bahrain's sovereignty over the Hawar Islands in 1936 (see Section 2.3.G.(iv)), accepting at that time the inclusion of Janan Island within the composition of islands in the Hawar group. In addition, the historical record of the negotiations for oil concessions establishes that by 1939, when Britain issued its Award confirming Bahrain's sovereignty over the Hawar Islands, not only the British Government and Bahrain, but also Qatar's oil concessionaire (and therefore, by

⁴²⁰ QM para. 7.4.

⁴²¹ QM para. 7.4.

⁴²² QM para. 7.5.

⁴²³ QM paras. 7.5 and 7.11.

association, the Ruler of Qatar), recognised that Janan Island was one of the Hawar Islands. The 1939 Award thus included Janan Island. The issue of Bahrain's sovereignty over Janan Island is therefore *res judicata* in the same manner as it is with respect to the other Hawar Islands.

(i) Britain did not "decide" in 1947 to award Janan Island to Qatar

314. Qatar asserts that Britain "decided" in 1947 that Janan Island belonged to Qatar. Its assertion is based on a mischaracterisation of two substantively identical letters sent on 23 December 1947 by the British Political Agent to the Rulers of Bahrain and Qatar, respectively, informing them of the British Government's views regarding the division of the seabed between the two States.

315. The British Political Agent's letter to the Ruler of Bahrain read in pertinent part:

"With the exceptions noted below [Britain] will, in future, regard all the sea-bed lying to the west of this line as being under the sovereignty of Your Highness and all the sea-bed lying to the east of it as being under the sovereignty of the Sheikh of Qatar

The exceptions referred to above are:-

Your Highness is recognised as having sovereign rights in

- (i) the areas of the Dibal and Jaradeh shoals ...
- (ii) Hawar Island, the islands of the Hawar group and the territorial waters pertaining thereto It should be noted that Janan Island is not regarded as being included in the islands of the Hawar group."⁴²⁴

316. As discussed more fully in Part II, Section 7.3, the purpose of the 1947 letters was not to notify the Rulers of a "decision" which they would be bound to respect. It was merely to inform them that the British authorities would henceforth consider the

⁴²⁴ Letter from British Political Agent to the Ruler of Bahrain, 23 December 1947. QM Ann. III.257, Vol. 8, p. 269. Letter from British Political Agent to the Ruler of Qatar. BM Ann. 297, Vol. 5, p. 1208; QM Ann. III.256, Vol. 8, p. 265.

seabed as being divided by the line described in the letters, particularly in the course of their dealings with the two competing oil companies concerned – PCL and BAPCO.

317. Qatar conveniently relies on only one part of Britain's so-called 1947 "decision" – the part purportedly awarding Janan Island to Qatar – yet rejects the rest of that "decision" – the part confirming Bahrain's sovereignty over the Hawar Islands, Fasht ad Dibal and Qit'at Jaradah. Qatar's reliance on the 1947 letters is thus not only misplaced, but internally inconsistent. For its part, Bahrain has never accepted the 1947 letters as legally binding.⁴²⁵

318. The policy expressed in the 1947 letters was based largely on an analysis and recommendation prepared in December 1946 by the then British Political Agent, A.C. Galloway. In approving that recommendation to the Secretary of State for India, the British Political Resident identified three reasons why the British Political Agent had excluded Janan Island from the Hawar Islands in making his recommendation for the seabed delimitation:

"[Janan] (a) is separated from the main group of islands by a deep water channel, (b) flanks the Zakerit bay where Petroleum Concession Limited have their landing place, and (c) is not included in the list of islands submitted by the Bahrain Government in 1938 when the question of the ownership of the Hawar group was being decided."⁴²⁶

319. As will be shown, not one of the reasons given by Galloway constituted a valid basis for denying Bahrain's sovereignty over Janan Island. Qatar's reliance on the

⁴²⁵ The Ruler of Bahrain immediately informed the British authorities of his disagreement with the proposed delimitation, pointing out that at no time during lengthy oil concession negotiations had British officials ever demurred from Janan's inclusion in the concession areas under discussion. He also identified specific acts of sovereignty by Bahrain in connection with Janan. Translation of letter dated 19 Safar 1367 (corresponding to 31 December 1947) from the Ruler of Bahrain to the British Political Agent, C.J. Pelly. QM Ann. IV.118, Vol. 10, p. 83.

⁴²⁶ Letter from British Political Resident to the Secretary of State for India, 18 January 1947. BM Ann. 344, Vol. 6, p. 1478; QM Ann. III.250, Vol. 8, p. 233.

British Political Agent's views to support its claims of sovereignty over Janan Island is therefore misplaced.

(ii) The British Political Agent's choice of the 1938 list was mistaken

320. One of the principal reasons cited by the British Political Agent for excluding Janan Island from the Hawar Islands was the omission of Janan from a list submitted by the Bahrain Government Adviser in May 1938:

"The Bahrain Government have submitted at least three conflicting statements of the composition of the 'group'. In August, 1937, it was stated that there were nine islands in the Hawar archipelago, in 1938 their list included Hawar and 16 islands or groups of islets, and in 1946 the list comprised Hawar and 17.

The 1938 list was submitted in connection with the Hawar arbitration, and I propose to take that as their considered claim, particularly as no explanations have ever been given for changes."⁴²⁷ (Emphasis added.)

321. It will be shown that the words emphasised are obviously mistaken. The British Political Agent appears not to have known, or not to have made any effort to ascertain, is that, in addition to the three lists he did consider, there was a fourth list. That list clearly included Janan Island as one of the Hawar Islands.

322. As discussed in Section 2.3.G, in 1936, the Qatar concessionaire, PCL, had entered into negotiations with the Ruler of Bahrain for a concession to the Bahrain unallotted area. In the circumstances, the Ruler of Bahrain had sought to ensure that the concession area was defined precisely. Accordingly, the Adviser to the Bahrain Government submitted to the British Government a written statement formally confirming the Ruler of Bahrain's assertion of sovereignty over the Hawar Islands. The statement included a list of the islands considered by the Ruler at that time to be part of the Hawar Islands, as follows:

⁴²⁷ Letter from British Political Agent to British Political Resident, 31 December 1946. QM Ann. III.249, Vol. 8, p. 219.

"The Hawar group of islands include the following named islands as well as a number of small islets.

1. Noon
2. Meshtaan
3. Al-Materrad
4. Rubadh
5. Hawar
6. Ginan [*i.e.*, Janan]
7. Mahazwarah"⁴²⁸

323. The significance of the 1936 list lies in the fact that Janan Island was included in what appears to be the first formal written statement by Bahrain of its sovereignty over the Hawar Islands. When PCL sought the British Government's opinion as to whether the Islands belonged to the Ruler of Bahrain or Qatar, Britain did not object to the Ruler's definition of the Hawar Islands. Moreover, at no time during its evaluation of the evidence presented did Britain consider Janan as separate from the rest of the Hawar Islands, and it did not exclude Janan Island from the scope of the opinion it issued, even though to have done so would have been in PCL's, and hence Britain's, best interests; it will be recalled that if Janan Island had been considered separate from the Hawar Islands, it would automatically have fallen to PCL under its 1935 Qatar concession.

324. The first of the three lists Galloway did consider was one submitted in August 1937 by the Bahrain Government in response to a request from the then British Political Agent, Hugh Weightman, for a list setting out the islands the Ruler of Bahrain considered to be his. This list stated as follows:

"In addition to the large islands forming the Bahrain archipelago, which are well known, the following islands belong to Bahrain:-

- Fisht Dibal (a reef)
- Qattah Jarada (an island)
- Fisht al Jarim (a reef)
- Khor Fisht (an island)
- Al Benat (an island)

⁴²⁸ Letter from the Adviser to the Government of Bahrain to the British Political Agent, 28 April 1936. BM Ann. 246, Vol. 5, p. 1071; QM Ann. III.103, Vol. 7, p. 15.

the Howar archipelago, consisting of nine islands near the Qatar coast."⁴²⁹

325. That no mention is made specifically of Janan obviously cannot be interpreted to mean that the Bahrain Government no longer considered – or the British Government no longer understood – the island to be among those of the "Howar archipelago". To the contrary, in the light of the clearly demarcated concession area that Bahrain was offering to PCL at the time (see Section 2.3.G, above), with Britain's acquiescence, there can be no question that the island was understood to be one of the "nine" considered to constitute the "Howar archipelago". Thus, there was no greater need for Bahrain to mention Janan than any of the other islands in the Hawar group.

326. The second of the three lists considered by Galloway was an attachment to a preliminary statement of evidence which Belgrave had submitted to Weightman on 29 May 1938, in the context of the Hawar arbitration. The attachment was entitled "The Hawar Islands". It read:

"This group of islands consist of one large island ... which is known as Hawar island and also a number of islands and rocky islets which are adjacent to Hawar island. On each of the islands there is a stone beacon The beacons are numbered as follows:-

1. South Sawad (Sawad – Black)
2. Al Wakra (1) (Hawk's stand)
3. " (2)
4. " (3)
5. Bu Sedad rocks, four rocks.
6. Bu Saada islands, four small islands
7. "
8. "
9. "
10. Al Mahzoura.
11. North Sawad.
12. Al Hajiat (the female Hajis)
13. " two islands.
14. Ajaira. (the widow)

⁴²⁹ Letter from Charles Belgrave, Adviser to the Bahrain Government to the British Political Agent, 14 August 1937. BM Ann. 335, Vol. 6, p. 1456.

15. Rabadh.
16. Al Moataradh. (the intervener)⁴³⁰ (Emphasis added.)

327. In choosing to characterise this list as Bahrain's "considered claim" in the 1938/39 Hawar arbitration, Galloway failed to appreciate that the list was not intended by Belgrave to identify all the islands constituting the Hawar group; this is clear from the explicit text that precedes the list ("the beacons are numbered as follows:"). Rather it was a listing of those of the islands in the Hawar group on which Bahraini beacons had been placed as of May 1938.⁴³¹ Janan Island was one among a number of Bahraini islands that had not been beacons as of that date. The fact that it was not on Belgrave's list, therefore, cannot be taken to imply a recognition that it, like the other non-beacons islands, did not belong Bahrain.

328. The foregoing is confirmed by the fact that within days of submitting the "preliminary statement", to which the list of beacons islands was attached, Belgrave forwarded to the British Political Agent a concession map clearly showing Janan Island as part of the Hawar Islands concession area being offered by the Ruler of Bahrain to PCL. (See Section 2.3.G, above).

329. On 10 July 1946, Belgrave submitted the third of the three lists considered by Galloway. It was described as a complete list of "the cairns which were erected on the various reefs and islands ... built during 1357 and 1358 [*i.e.*, 1938 and 1939]."⁴³² Belgrave indicated that all of those islands numbered 1 through 18 on the list were considered to be part of the Hawar Islands. Janan Island was included on the list as

⁴³⁰ Note by Charles D. Belgrave, Adviser to the Government of Bahrain, entitled "the Hawar Islands", 29 May 1938. BM Ann. 261, Vol. 5, p. 1106; QM Ann. III.158, Vol. 7, p. 291.

⁴³¹ Translation of letter dated 19 Safar 1367 (corresponding to 31 December 1947) from the Ruler of Bahrain to the British Political Agent ("[Janan] is marked by a beacon which we constructed in 1358"). QM Ann. IV.118, Vol. 10, p. 83. The first month of the Islamic year 1358 corresponds to February 1939. Janan, thus, was beacons sometime after February 1939.

⁴³² Letter from Charles Belgrave, Adviser to the Bahrain Government to British Political Agent, 10 July 1946. BM Ann. 342, Vol. 6, p. 1473; QM Ann. III 243, Vol. 8, p. 195.

number 15. (This confirms the fact that the 1938 list was only a limited listing of Bahraini beacons.)

330. In sum: Galloway's choice of the 1938 list was demonstrably mistaken. It did not represent Bahrain's, Britain's, or the oil companies' understanding of what islands were included in the Hawar group. He misused the list for a purpose for which it was not intended. Moreover, there is no evidence that he was aware of or considered the 1936 list, which specifically identified Janan Island as one of the Hawar Islands and was the first list submitted by Bahrain as part of a formal claim to the Islands. He inexplicably interpreted the general reference to the Hawar archipelago in the 1937 list as excluding Janan Island. And he gave no weight to the 1946 list, which was the most recent and complete statement of the islands that Bahrain considered to be part of the Hawar Islands group. The British Political Agent's only justification for choosing the 1938 list appears to be that the Bahrain Government had never explained why the three lists he considered varied from each other. British records, however, contain no indication that he ever made any effort to clarify the matter with Bahrain. Most of all, the 1938 list on its face shows that it was not intended to define the Hawar Islands, but to identify islands on which beacons had been erected.

(iii) The British Political Agent relied on unverified survey information

331. In preparing his report, Galloway visited the Hawar Islands. Solely on the basis of the visual impressions he formed on that trip, he submitted to the British Political Resident the following unverified observations relating to the geo-morphological features of Janan Island, which the British Political Resident and other British officials would subsequently accept as scientific truths:

"Janan is shown on charts and plans as a pimple of an island, but, in fact, at low tide it shows a long low reef rising above the sea. It is dry at all tides at its western end, and dries out a long way towards the mainland. It has not been surveyed, but to the layman it appears to be part of the

Ras Awainat Ali feature, and completely separate from Hawar."⁴³³
(Emphasis added.)

332. When the India Office conveyed the British Political Agent's recommendation to the Admiralty Department, it failed to make any reference to Galloway's admission that his assessment of Janan Island's geo-morphological features was that of a "layman" or that his impressions had not been confirmed by a proper survey. Galloway's information thus took on a misleading appearance of legitimacy.⁴³⁴

333. The effect of the repeated mischaracterisation of the British Political Agent's "survey" gradually led to acceptance of his assessment as a verified scientific fact.⁴³⁵ Thus, when the British Government refused the Ruler of Bahrain's request that the proposed seabed delimitation be re-examined, one of the principal reasons cited was the Galloway survey:

"... as an examination on the spot has shown that it is separated from the Hawar Group of Islands by a deep channel and is rather part of the Ras Awainat Ali feature of the mainland of Qatar rather than of the Hawar group of islands, it has been decided that it cannot be regarded as having been allotted to Bahrain by the Order of 1939"⁴³⁶

(iv) The British Political Agent was influenced by extraneous considerations

334. In 1946, BAPCO applied to commence drilling operations in the additional area it had been granted under its Bahrain concession, including on the main island of

⁴³³ Letter from British Political Agent to British Political Resident, 31 December 1946. QM Ann. III.249, Vol. 8, p. 219.

⁴³⁴ Letter from F.A.K. Harrison, India Office, to G.C.B. Dodds, Admiralty, 13 February 1947. Ann. 109, Vol. 2, pp. 335-339.

⁴³⁵ Qatar also appears to have been impressed by Galloway's "layman's" assessment, which it invokes, without reference to any independent corroboration, to support its claim that the "Hawar islands as a whole", like Janan, are part of the Ras Awainat Ali feature. QM para. 7.11. Leaving aside the validity of Galloway's information, the existence or not of the geo-morphological features Galloway mentioned are irrelevant to the issue of sovereignty.

⁴³⁶ Letter from the British Political Agent to the Ruler of Bahrain, 30 April 1949. QM Ann. IV.133, Vol. 10, p. 179.

Hawar. BAPCO's intention to start drilling in areas near to its concession territory concerned PCL, thus prompting it to make its views known to the British Government:

"You will remember a visit ... paid to you on 17th June. We spoke, among other things about the water which passes between Hawar Island (allotted to Bapco) and the mainland of Qatar, which is ours. Our fear was that Qatar, and therefore ourselves, might not receive its due share of the territorial waters between the two zones.... Our hope is that the Qatar/Hawar water question may be favourably settled before Bapco start drilling."⁴³⁷

335. Evidently Galloway must have been influenced by the concerns PCL had expressed, as reflected in one of the reasons he gave in support of his recommendation that Janan Island be severed from the Hawar Islands:

"Before a delimiting line can be drawn the composition of the 'group' must be decided, and Janan lends itself to separate treatment and is a convenient starting point. The line on chart A.P.G. is drawn covering the island of Janan, which lies just south of Hawar, and which flanks the entrance to the Duhat Az Zagreet in which lies the P.C.L. landing place, Zagreet. The island was included in the Additional Area on the plans annexed to the draft leases. The deep water channel lies between Hawar and Janan, and as Hawar belongs to Bahrain if Janan is to be considered as an island of the 'group' then the entrance to the Duhat Az Zagreet would be controlled by Bahrain and the Bahrain Petroleum Company. That state of affairs would be most undesirable, for example a rig might be erected and block the channel."⁴³⁸ (Emphasis added.)

⁴³⁷ Letter from PCL to E.P. Donaldson (India Office), 16 July 1946. QM Ann. IV.84, Vol. 9, p. 401.

⁴³⁸ Letter from British Political Agent to British Political Resident, 31 December 1946. QM Ann. III.249, Vol. 8, p. 219. It is notable that in the aftermath of Britain's 1939 Award, PCL had emphasised to the British Government the importance of the Bahrain to Zekrit route to PCL's operations:

"If the Bahrein Petroleum Company are proposing to commence operations in the Hawar Group shortly the matter is not without importance to this Company.

It is essential to the Co.'s work at the moment, for instance, that the present route from Bahrein to Zekhrif where it passes between the main Hawar Island and the Islet of Jinan (about a mile south of it) should be kept open as a right of way."

Letter from E. Packet (PCL) to H. Weightman, British Political Agent, 2 December 1939. Ann. 103, Vol. 2, p. 310.

336. Galloway thus took into account considerations having absolutely no bearing on legal entitlement to territory. This is not an issue of bias, but of disqualifying the recommendation as a legally binding "decision" (see also Section 7.3.B).

(v) The British Political Agent failed to take into account directly relevant evidence

337. Galloway disregarded evidence specifically establishing Bahrain's sovereignty over Janan, as demonstrated by this excerpt from his report.

"The island is barren, but is used by Bahrain fishermen ... and beyond the erection of a cairn by the Bahrain Government I know of no justification for their claim to ownership."⁴³⁹

338. The British Political Agent thus acknowledged two indicia of Bahraini sovereignty over Janan Island: first, that the island was used by Bahraini nationals, and secondly, that it had been marked in 1938 by Bahrain. He gave neither factor any weight.

339. In contrast, the British Political Agent was only able to hazard a guess as to Janan Island's use by Qatari subjects:

"The island ... is used by Bahrain fishermen, and I dare say by Qataris on occasions."⁴⁴⁰ (Emphasis added.)

340. The British Political Agent's statement is inconsistent with the known human geography of the Qatar peninsula at the time, which Bahrain has described in detail in Sections 2.2.A and 2.2.B of this Counter-Memorial: the west coast of Qatar simply was not inhabited by persons owing their allegiance to the Al-Thani chiefs based in Doha across the desert.

⁴³⁹ *Ibid.*

⁴⁴⁰ Letter from British Political Agent to British Political Resident, 31 December 1946. QM Ann. III.249, Vol. 8, p. 219.

341. In his report to the British Political Resident, Galloway recommended that Britain recognise Bahrain's sovereignty over Fasht ad Dibal and Qit'at Jaradah. The British Political Resident reported the recommendation to the Secretary of State for India in the following terms:

"On both shoals there is a cairn and an artesian well bored by [BAPCO] on behalf of the Bahrain Government...

With regard to the ownership of these two places I reluctantly agree with the Political Agent that ... they must be regarded as belonging to Bahrain. They have been treated by the Bahrain Government as their property and beacons have been erected and wells bored without any kind of protest by the Shaikh of Qatar. In fact, as the Political Agent points out, the Shaikh of Qatar is a late arrival on the scene. He only consolidated his position on the mainland as recently as 1937 and has not taken steps to establish his position over neighbouring islands and shoals.... Further, [the British Government] and its officers have acquiesced in these shoals being described as Bahrain property in the negotiations with [PCL] in 1938-39 vide Article I of the various draft agreements and the maps attached to them. My view is therefore that the two shoals should be assigned to Bahrain which has done all it can to establish its sovereignty over the places ... without any kind of protest from Qatar."⁴⁴¹

342. This passage shows that the British Political Resident identified five factors which in his view established Bahrain's sovereignty over Fasht ad Dibal and Qit'at Jaradeh. They were: (1) acts of sovereignty by the Ruler of Bahrain, as evidenced by the erection of cairns; (2) use of the territory in question by Bahrain; (3) failure by Qatar to assert sovereignty over the territory in question; (4) lack of any protest by the Ruler of Qatar to acts of sovereignty by Bahrain; and (5) recognition by the British authorities in the context of the oil concession negotiations that the territory in question was considered to be part of Bahrain.

⁴⁴¹ Letter from British Political Resident to Secretary of State for India, 18 January 1947. BM Ann. 344, Vol. 6, p. 1478; QM Ann. III.250, Vol. 8, p. 233.

343. It is striking to note that the very reasons Galloway gave to justify his recommendation with respect to Qit'at Jaradeh and Fasht ad Dibal, apply equally to Janan Island. (See Sub-Section (vii), below.) Yet without any justification, he chose to disregard every one of them.

(vi) Bahrain's sovereignty over Janan Island was recognised by Britain in 1936 and confirmed in 1939

344. It is irrelevant that in 1947, almost 10 years after the 1939 Award, in the context of setting forth their views regarding a proposed seabed delimitation between Bahrain and Qatar, that British officials interpreted the 1939 Hawar Islands Award not to apply to Janan Island.⁴⁴² The fact remains that the 1939 Award stands as the only legally binding ruling concerning the ownership of the Hawar Islands. When it was issued, it did nothing more than confirm the historical reality of Bahrain's sovereignty over the Islands. Specifically with respect to Janan Island, the record of the concession negotiations for the Bahrain unallotted area demonstrates that the 1939 Award confirmed a finding that Britain had made just three years earlier in 1936.

345. Following Britain's 1936 opinion, all oil concession negotiations included the Hawar Islands as being within the concession territory of Bahrain. As discussed below, given the explicit mention of Janan Island in the relevant correspondence, none of the concerned parties could have been mistaken as to Janan Island's status as part of that territory.

346. Thus in April 1937, the concession area offered to PCL was described as:

⁴⁴² Letter from British Political Agent to the Ruler of Bahrain, 30 April 1949. QM Ann. IV.133, Vol. 10, p. 179.

"The Hawar group of islands consisting of Hawar and approximately 14 lesser islands which are distinguished by stone beacons, Fisht Jarim, Khor Fisht Dibil."⁴⁴³ (Emphasis added.)

347. The islands comprising the Hawar group were described as all of those contained within an area enclosed by the following points:

- "(a) The northern edge of Bainain islet.
- (b) The western edge of a reef north of Muharraq.
- (c) The south west edge of reef off Ras al Birr.
- (d) A point to the south of Janan island.
- (e) A point to the east of Hwar island.
- (f) A point to the east of Hawar island.
- (g) North west edge of a reef North of Fisht Dibal.
- (h) and (i) Two points on the northern edge of a reef to the North of Fasht al Jarim."⁴⁴⁴ (Emphasis added.)

A map illustrating the area described above, also clearly included Janan Island within the demarcated concession area and, as such, as part of the "Hawar group of islands".

348. Prior to the commencement of the 1938-1939 arbitration, Britain fully understood Janan Island to be one of the Hawar Islands. On 28 April 1938, the India Office forwarded to Sir Trenchard Fowle, the British Political Resident, two maps attached to a document entitled "[PCL] Draft Bahrein Lease". The territorial scope of the proposed concession was described in the following terms:

"The areas to which this Agreement applies are ... SECONDLY:- The whole of that portion of the Shaikh's dominions (Leased Area No.2) including the whole of the Hawar Group of Islands and all reefs, shoals, islands and waters comprised within the following boundary limits...."⁴⁴⁵ (Emphasis added.)

⁴⁴³ Copy of letter No. P.A./171 from E.A. Skinner, BAPCO, to British Political Agent, 13 April 1937. Ann. 81, Vol. 2, pp. 251-258.

⁴⁴⁴ *Ibid.*

⁴⁴⁵ Letter from A.C.B. Symon, India Office to Sir Trenchard Fowle, British Political Resident, 28 April 1938. BM Ann. 337, Vol. 6, p. 1458.

Once again, a map attached to the draft lease showed Janan Island as included within the demarcated concession area, and thus as one of the islands making up the "Hawar Group of Islands."

349. The British Government gave its considered assent to the terms of the draft concession, and in the process specifically expressed its agreement with the definition of the Hawar Islands:

"... there is no objection so far as [the British Government] are concerned to [PCL] applying to the Sheikh of Bahrein (at the appropriate time) for a concession over the two areas indicated in the maps attached to the draft concession...

With regard to the definition of the proposed concession areas we think that as the boundary limits which are defined by the geographical co-ordinates in Article 1 of the draft lease clearly go round the Hawar group of islands it would be advisable in present circumstances to avoid mentioning these islands by name."⁴⁴⁶ (Emphasis added.)

350. Even after the Ruler of Qatar had formally submitted his claim to the Hawar Islands on 10 May 1938, the British Government continued to acknowledge that the Hawar Islands included Janan Island. This is evidenced by a letter from the British Political Agent to the Secretary of State for India dated 22 May, 1938:

"I forward herewith descriptions of the areas to be offered to [PCL] and [BAPCO], which have been prepared with the assistance of the Senior Naval Officer, Persian Gulf Division."⁴⁴⁷

351. The description of the concession area confirmed beyond question that Janan Island was considered by Britain to be part of the Hawar group of islands. It stated in pertinent part:

⁴⁴⁶ Letter from R. Peel, India Office to S.H. Longrigg, PCL, 29 April 1938. Ann. 85, Vol. 2, pp. 264-266.

⁴⁴⁷ Letter from H. Weightman, British Political Agent to Secretary of State for India, 22 May 1938. Ann. 86, Vol. 2, pp. 267-268b.

"... thence in a straight line running in a south-easterly direction to point D on the southern extremity of JENAN island in the Hawar Group of Islands."⁴⁴⁸ (Emphasis added.)

352. A few days after Belgrave submitted Bahrain's "preliminary statement", in a report to the British Political Agent regarding a meeting with PCL to discuss the proposed concession area, he attached a description of that area which clearly included Janan Island within its borders:

"The Hawar group of islands consisting of Hawar and approximately 14 lesser islands which are distinguished by stone beacons, Fisht Jarim, Khor Fisht Dibil. All reefs, fresh water submarine springs, submerged lands, islands and waters contained within the area enclosed by the following points:-

- (a) The northern edge of Bainain islet
- (b) The western edge of a reef north of Muharraq
- (c) The south west edge of reef off Ras al Birr
- (d) A point to the south of Janan island
- (e) A point to the east of Hwar island
- (f) A point to the east of Hawar island
- (g) North west edge of a reef north of Fisht Dibal
- (h) and (i) Two points on the northern edge of a reef to the North of Fasht al Jarim."⁴⁴⁹ (Emphasis added.)

Although no map was provided, the description of the proposed area was exactly the same as that which had been under discussion in April 1937. As discussed, the map illustrating the 1937 proposed concession area clearly included Janan Island as one of the "Hawar group of islands".

353. A 1939 draft of the concession agreement between PCL and the Ruler of Bahrain, to which the British Government does not appear to have voiced any objection, confirms that Bahrain and Britain continued to view Janan Island as part of the Hawar Islands in 1939. Article 1 of the draft 1939 agreement stated as follows:

⁴⁴⁸ *Ibid.*

⁴⁴⁹ Letter from the Adviser to the Bahrain Govt. to British Political Agent, 6 June 1938. Ann. 89, Vol. 2, pp. 271a-271d.

"The area to which this Agreement applies is :-

The whole of that portion of the Shaikh's dominions being all those Islands known as the Hawar group of Islands in which is comprised a total of fourteen (14) islands and the waters between those Islands and the waters between those Islands and the territorial waters on the western side of the main Island of Hawar.

The above area (hereinafter referred to as the "Leased Area") is shown on the Enlarged Inland Departmental Government of Bahrain map ...and reproduced on the attached map – the "Leased Area" being coloured in Red⁴⁵⁰

Consistent with the generally held view, like the other Hawar Islands, Janan Island was also coloured red.

354. The record of the oil concession negotiations establishes unequivocally that Janan Island was understood to be part of the Hawar Islands by the British authorities, PCL (Qatar's oil concessionaire), BAPCO and the Bahrain Government. The terms "Hawar Islands Group", "Hawar group of islands", "Hawar group" and "Hawar Islands" were used synonymously by all concerned. Their draft concession agreements, concession maps and related correspondence, unquestionably and consistently included Janan Island as one of the Hawar Islands. Accordingly, when Britain undertook in 1938 to determine finally the question of the ownership of the Hawar Islands, it was clearly understood that the enquiry included Janan Island within its purview.

355. British records from before the start of the arbitral proceedings, confirm that British officials were aware that they had to determine the ownership, as between the Rulers of Qatar and Bahrain, of the "Hawar group of islands".

356. Thus, for example, at a meeting held on 12 April 1938, at the India Office, PCL indicated its understanding that the Ruler of Bahrain was considering giving to BAPCO

⁴⁵⁰ Draft Concession Agreement entitled "1939; The Leased Area; Hawar Islands; Bahrain", Article 1. Ann. 104, Vol. 2, pp. 311-327.

"everything except the Hawar Group of islands".⁴⁵¹ (Emphasis added.) In the discussion that ensued, Sir Trenchard Fowle, one of the British officials involved in administering the proceedings, pointed out that PCL's "proposed concession area included certain islands (i.e., the Hawar Group and Fasht Dibal) whose ownership as between Bahrein and Qatar had not yet been clearly determined."⁴⁵² (Emphasis added.)

357. The scope of the enquiry is further clarified in a letter from the Foreign Office to the India Office, dated 13 April 1938:

"I write in reply to your letter ... about the resumption of oil negotiations for the 'Bahrein unallotted area' and the question of the ownership of Fasht Dibal and the Hawar Group of islands In view of the impending oil negotiations we feel that a decision on this question will be convenient"⁴⁵³ (Emphasis added.)

358. On 20 May 1938, the British Political Agent notified the Bahrain Government that the Ruler of Qatar was "laying claim to the Hawar Islands."⁴⁵⁴ (Emphasis added.) Similarly, in forwarding the Ruler of Qatar's claim to the British Political Resident, the British Political Agent defined the scope of the dispute between the two Rulers in the following terms:

"... in reply to the present communication from Shaikh Abdullah bin Qasim I should write and inform him that though the Bahrain Government possess a prima facie claim to the Hawar group of islands which is supported by their formal occupation of them for some time past, [Britain] would be prepared to give consideration to a formal claim by him provided such a claim were supported by a full and complete

⁴⁵¹ Record of an Informal Meeting held at the India Office on 12 April 1938 to discuss the activities of PCL on the Arab Coast of the Persian Gulf. QM Ann. III.148, Vol. 7, p. 241.

⁴⁵² *Ibid.*

⁴⁵³ Letter from T.V. Brenan, Foreign Office, to J.P. Gibson, India Office, 13 April 1938. BM Ann. 255, Vol. 5, p. 1092; QM Ann. III.149, Vol. 7, p. 249.

⁴⁵⁴ Letter from British Political Resident to the Adviser to the Bahrain Government, 20 May 1938. QM Ann. III.154, Vol. 7, p. 271.

statement of the evidence on which he relied in asserting Qatar sovereignty over this group of islands."⁴⁵⁵ (Emphasis added.)

359. The Foreign Office and the India Office also understood the scope of the dispute to be with respect to the Hawar group of islands:

"I am replying to your letter ... in regard to the rival claims of the Sheikh of Qatar to the Hawar group of islands".⁴⁵⁶ (Emphasis added.)

360. The British Political Agent whose responsibility it had been to gather and evaluate the evidence of the two Rulers at the time was Hugh Weightman. In his capacity as British Political Agent, there can be no doubt that he was both fully aware of all of the oil concession negotiations, and would have been sensitive to any territorial issues raised in the context of those negotiations. Indeed, the need for a decision on the question of the ownership of the Hawar Islands had been triggered by the very concession negotiations he was monitoring. By virtue of his integral role in the oil negotiations, which entailed his reviewing the concession maps and draft agreements referred to above, Weightman would have understood that the "Hawar group of islands" included Janan Island. If Weightman thought that Janan Island should not be covered by the 1939 Award, he would have had to say so when he made his detailed analysis and recommendation in favour of Bahrain. He did not.

361. In his report to the British Political Resident, Weightman confirmed Bahrain's sovereignty over the Hawar Islands. He further confirmed that it was his understanding that the decision that would ultimately be taken on the basis of his report would apply to all of the Hawar Islands:

"The small barren and uninhabited islands and rocky islets which form the complete Hawar group presumably fall to the authority of the Ruler establishing himself in the Hawar main island, particularly since marks

⁴⁵⁵ Express letter from H. Weightman, British Political Agent to Lt. Col. Fowle, British Political Resident, 15 May 1938. BM Ann. 257, Vol. 5, p. 1096; QM Ann. III.152, Vol. 7, p. 261.

⁴⁵⁶ Letter from Foreign Office to India Office, 12 July 1938. QM Ann. III.165, Vol. 7, p. 327.

have been erected on all of them by the Bahrain Government."⁴⁵⁷
(Emphasis added.)

362. The British decision in July 1939 expressed the following general understanding as to which islands it applied to:

"... on the subject of the ownership of the Hawar Islands I am directed by His Majesty's Government to inform you that, after careful consideration of the evidence adduced ... they have decided that these Islands belong to the State of Bahrain and not to the State of Qatar."⁴⁵⁸

No reservation was made with respect to Janan Island.

(vii) Independently of the 1939 British Award, Bahrain's sovereignty over Janan Island in the Hawar Islands is well-established

363. Britain's 1939 Award notwithstanding, Bahrain's ownership of Janan Island, as with the other Hawar Islands, is established by the island's use by Bahraini subjects and the Ruler of Bahrain's exercise of authority over the island. In contrast, although Qatar challenges Bahrain's sovereignty over Janan Island, it has provided no authentic evidence supporting its claim of sovereignty over the island other than the so-called British "decision" in 1947. If anything, all the 1947 letters did was record a geographical truth that Janan Island lies physically closer to the Qatar peninsula than to the main islands of Bahrain. This Bahrain does not dispute. It is, however, irrelevant to the question of ownership.

364. Bahrain's sovereignty over Janan Island is well-recorded:

⁴⁵⁷ Letter from H. Weightman, British Political Agent, to Lt. Col. Fowle, British Political Resident, 22 April 1939. BM Ann. 281, Vol. 5, p. 1165; QM Ann. III.195, Vol. 7, p. 497.

⁴⁵⁸ Letters from British Political Resident to Ruler of Bahrain and Ruler of Qatar, 11 July 1939. BM Ann. 287, Vol. 5, p. 1182 and BM Ann. 288, Vol. 5, p. 1183; QM Ann. III.208, Vol. 8, p. 37 and QM Ann. III.209, Vol. 8, p. 41.

- In 1947 the Ruler of Bahrain requested the British Government to reconsider its position regarding the proposed seabed delimitation. In that context he proffered evidence demonstrating Bahrain's ownership of Janan Island.

"We are unable to understand why our island of Jinan, which, owing to the rich fishing grounds around it, is an island of value, has been excluded from the Hawar group. Jinan is used as a base by our fishermen who are accustomed, with our permission, to erect huts on the island in the fishing season. Jinan has been recognised as one of the islands of the Hawar group and was specifically referred to by us in our letter to H.B.M.'s Political Agent, vide letter No. C/180 of April 28, 1936 from our Adviser to H.B.M.'s Political Agent. It is marked by a beacon which we constructed in 1358 [*i.e.*, 1939]."⁴⁵⁹

- Both the fact of Janan Island's use by Bahraini fisherman and the fact that a cairn had been erected on the island by the Bahrain Government were acknowledged in Galloway's report to the British Political Resident of 31 December 1946.⁴⁶⁰
- Janan Island's use by Bahraini subjects is further confirmed by the direct testimony of living Hawar Island residents, which Bahrain has already provided to the Court with its Memorial.⁴⁶¹

J. The evidence of Bahrain's sovereignty over the Hawar Islands is not undermined by Qatar's arguments

365. Genuine evidence, on the public record, establishes beyond doubt Bahrain's historical sovereignty over the Hawar Islands, including Janan Island. Undeniable historical facts led Britain to recognise Bahrain's sovereignty over the Islands in 1936.

⁴⁵⁹ Translation of letter dated 19 Safar 1367 (corresponding to 31 December 1947) from the Ruler of Bahrain to the British Political Agent (C.J. Pelly). QM Ann. IV.118, Vol. 10, p. 83.

⁴⁶⁰ Letter from British Political Agent to British Political Resident, 31 December 1946. QM Ann. III.249, Vol. 8, p. 219.

⁴⁶¹ See BM para. 405.

Unquestionable and uncontroverted proof provided the basis for Britain's arbitral award in 1939.

366. In its efforts to challenge the historical record, Qatar's sole response is the production of 81 fraudulent documents. Interwoven with these forgeries are genuine documents, excerpted, extracted, distorted and de-contextualised to relate a history that is both misleading and inaccurate. Once the fraudulent documents are discounted, the vacuity of Qatar's arguments is left exposed, with little authentic evidence to support its claim to the Hawar Islands. Its claim is reduced to one of geographical proximity, which is irrelevant to the present case. The extent of the positive evidence Bahrain can and has produced to show the continuum of its sovereignty over the Hawar Islands from the 18th Century to the present day is in no way adversely affected by Qatar's arguments.

367. Bahrain has presented to the Court in its Memorial, as it did to Britain during the 1938-1939 Arbitration, compelling evidence of its continuous sovereignty. Qatar's challenge to Bahrain's evidence is not tenable in the face of the historical record. Bahrain's Memorial details how the Hawar Islands supported a settled population of Bahrainis engaged in their traditional livelihood of fishing, gypsum quarrying, animal husbandry and pearling. Qatar's unsubstantiated denial that the Dowasir – the principal inhabitants of the islands – were Bahraini residents or subjects cannot withstand minimal scrutiny. The evidence showing Bahraini habitation was confirmed by the British authorities in the course of the 1938-1939 arbitration. The history of the oil concessions demonstrates that Bahrain and the oil companies considered that the Hawar Islands (including Janan Island) were Bahraini. The public record demonstrates this.

368. Bahrain's case is consistent with the public record showing evidence of regular Bahraini habitation of the islands from the early 1800s as well as with the physical evidence of that occupation that still exists to the present day. As has been shown, the Hawar Islands today, as in the past, form an integral part of the economic, social and

political structure of the State of Bahrain. No authentic evidence of Al-Thani control over the Islands has ever been produced. In sharp contrast, Bahrain has produced such evidence in abundance. Bahrain's sovereignty over the Hawar Islands, from the 18th Century until the present day, is beyond challenge.

CHAPTER 3

BAHRAIN'S TITLE TO THE HAWAR ISLANDS

IS RES JUDICATA

SECTION 3.1 Introduction

369. The Hawar Islands have been a part of the State of Bahrain for two centuries, during which Bahrain has continuously manifested the degree of habitation and control, consistent with the physical character of the islands, required by international law. The British decision of 1939 merely confirms a venerable historical, factual and legal situation.

370. Bahrain considers that the 1939 decision is *res judicata*, for the reason that it was a valid and binding arbitral award. Qatar's response to this contention is to assert that the decision is vitiated by a number of procedural flaws. In so doing, Qatar appears to accept that the decision was "arbitral" in character. For example, Qatar's Memorial cites in paragraph 6.79, without any reservation, a British Foreign Office analysis in 1938 of the contemplated proceedings which advises the British Political Resident about proper procedures "when one is assuming an arbitral rule [sic]⁴⁶² of this character."

371. But the terminology used in Qatar's Memorial is not always consistent, and no explanation is given for the differences in wording. At paragraph 6.122, Qatar refers to "the exercise of quasi-judicial powers of the kind which the British authorities were purporting to apply." Likewise, in paragraph 6.122 Qatar refers to "the exercise of quasi-judicial power of the kind which the British authorities were purporting to apply to the determination of the conflicting claims of Qatar and Bahrain". Again, at page 141

⁴⁶² Probably "role," as the quotation in QM para. 6.79 agrees.

of Qatar's Memorial (paragraph 6.144) Qatar submits that the 1939 decision "cannot be equated to an arbitral award and that, whether or not it is to be so treated, it would in any event be invalidated by reason of the serious procedural defects to which Qatar has drawn attention." Thus, the possibility is not entirely to be excluded that Qatar's argument may be that Britain's action in 1939 should be classified as something other than arbitral.

372. In Bahrain's view any such submission would be pointless. The procedural standards of arbitral or quasi-judicial proceedings are the highest that can be demanded of any person or body charged with determining rival claims – no matter how that process of determination may be described. Britain fully met those requirements. *A fortiori*, it must be concluded that Britain has satisfied the requirements of any other procedure.

SECTION 3.2 The procedures for the 1939 arbitration were straightforward and fair

373. The procedures in the 1939 arbitration were discussed in relevant detail in Bahrain's Memorial at Section 3.3. The record shows that, notwithstanding the need for an expedited decision created by the urgency of ongoing oil concession negotiations, the procedures developed by Britain were designed to ensure a full and fair review of the evidence presented by each claimant. The British Government took measures to ensure that the Ruler of Qatar was given every opportunity to present his claim in the most comprehensive way possible.

374. By describing the arbitral procedure out of chronological sequence, Qatar misrepresents it as a complicated and confusing exercise that ultimately compromised the interests of the Ruler of Qatar. To set the record straight, Bahrain sets out below in a

chronological order and in telegraphic style the pertinent stages of the arbitral proceedings.

- February 1938** **British Political Agent meets Ruler of Qatar in Doha.** Ruler of Qatar asserts that Hawar Islands belong to Qatar. British Political Agent encourages the Ruler to substantiate his claim, to which Ruler states Bahrain had no "de jure rights" to Hawar Islands but says nothing further. No claim formulated by Qatar at this stage.⁴⁶³
- 10 May 1938** **First of two letters constituting Qatar's formal claim to Hawar Islands.**⁴⁶⁴ Reporting on claim to British Political Resident, British Political Agent comments that "apart from the geographical argument no evidence is offered in support of the Qatar claim."⁴⁶⁵
- 19 May 1938** **British Political Resident informs Bahrain of Ruler of Qatar's claim to Hawar Islands.**⁴⁶⁶
- 20 May 1938** **British Political Agent writes to Ruler of Qatar to encourage Qatar's claim.** British Political Agent states to Ruler of Qatar that Britain "will give the fullest consideration to any formal claim" by Qatar, provided such claim "is supported by a full and complete statement of the evidence on which you rely in asserting that you, as Sheikh of Qatar, possess sovereignty over them."⁴⁶⁷ British Political Agent reiterates "how important it is that your formal claim, supported by all the evidence which you can produce", be submitted.

⁴⁶³ Letter from Hugh Weightman, British Political Agent, to Lt. Col. Fowle, British Political Resident, 15 May 1938. BM Ann. 257, Vol. 5, pp. 1096-1097; QM Ann. III.152, Vol. 7, pp. 261-266.

⁴⁶⁴ Letter from Ruler of Qatar to Hugh Weightman, British Political Agent, 10 May 1938. BM Ann. 256, Vol. 5, pp. 1094-1095; QM Ann. III.150, Vol. 7, pp. 253-256.

⁴⁶⁵ Letter from Hugh Weightman, British Political Agent, to British Political Resident, 15 May 1938. BM Ann. 257, Vol. 5, pp. 1096-1097; QM Ann. III.152, Vol. 7, pp. 261-266.

⁴⁶⁶ Telegram no. 191 of Lt. Col. Fowle, British Political Resident, to Charles Belgrave, Adviser to the Bahrain Government, 19 May 1938. QM Ann. III.153, Vol. 7, pp. 271-273.

⁴⁶⁷ Letter from Hugh Weightman, British Political Agent, to Ruler of Qatar, 20 May 1938. BM Ann. 258, Vol. 5, pp. 1098-1100; QM Ann. III.156, Vol. 7, pp. 279-284.

- 23 May 1938** **Bahrain conveys to British Political Agent the Ruler of Bahrain's amazement at Qatar's submission of a claim to Hawar Islands.** Adviser to Government of Bahrain states that proof of Bahraini sovereignty can be provided when demanded.⁴⁶⁸ Subsequently Bahrain submits to the British Political Agent a "preliminary statement."⁴⁶⁹
- 27 May 1938** **Qatar submits the second of two letters constituting its formal claim to Hawar Islands.**⁴⁷⁰
- 30 May 1938** **British Political Agent meets with Ruler of Qatar and his advisers (his two sons Hamad and Ali and his Secretary Saleh al Mana) to discuss Qatar's claim.** The British Political Agent "questioned [the Ruler] closely" in regard to Qatar's claim.⁴⁷¹ Repeatedly enquires as to whether the two letters put forward by the Ruler of Qatar presented his claim "in all the detail he wished", or whether Ruler had "any other evidence, documentary or otherwise, which he would wish to submit". Ruler states he has set out all he wished to say in the two letters. The British Political Agent observes that Qatar's claim consists of: "(1) a bare assertion of sovereignty; and (2) the affirmation that the Hawar Islands are part of the geographical unit of Qatar."⁴⁷²
- 3 June 1938** **British Political Agent forwards to British Political Resident "preliminary statement" submitted by Bahrain and Qatar's second letter of claim.**⁴⁷³ British Political Agent states, referring to the "preliminary statement", "I have not acknowledged receipt, since the Bahrain counter-claim has not yet been called for officially; nor should this document be regarded as a full and final compilation of the Bahrain evidence."

⁴⁶⁸ Letter from Charles Belgrave, Adviser to Bahrain, to Hugh Weightman, British Political Agent, 23 May 1938, India Office Records. Ann. 87, Vol. 2, p. 269.

⁴⁶⁹ Bahrain "preliminary statement" submitted to British Political Agent. The date of this statement is unclear, but "29.5.38." has been written manually at the top of the first page, perhaps indicating its date of receipt rather than its date of expedition. BM Ann. 261, Vol. 5, pp. 1106-1111; QM Ann. III.158, Vol. 7, pp. 291-298.

⁴⁷⁰ Letter from Ruler of Qatar to Hugh Weightman, British Political Agent, 27 May 1938. BM Ann. 260, Vol. 5, pp. 1102-1105; QM Ann. III.157, Vol. 7, pp. 285-290.

⁴⁷¹ Extract from British Political Agent's note, 30 May 1938. Ann. 88, Vol. 2, pp. 270-271.

⁴⁷² Letter from British Political Agent to British Political Resident, 3 June 1938. BM Ann. 262, Vol. 5, p. 1114; QM Ann. III.159, Vol. 7, p. 304.

⁴⁷³ Letter from Hugh Weightman, British Political Agent, to Lt. Col. Fowle, British Political Resident, 3 June 1938. BM Ann. 262, Vol. 5, pp. 1112-1114; QM Ann. III.159, Vol. 7, pp. 299-304.

- 15 June 1938** **Request from Ruler of Qatar to British Political Agent to be informed of the bases of Bahrain's claim**, in order to be able to rebut them. The Ruler states that he may have more evidence to produce, depending on the nature of Bahrain's claims.⁴⁷⁴
- 21 June 1938** **British Political Agent forwards to the British Political Resident the Ruler of Qatar's 15 June letter.** British Political Agent recommends that no notice be taken of the Sheikh's claim that new evidence may be available, calling such claim "...a complete contradiction of his previous very clear statement to me personally, in response to repeated questions, that he had produced all the evidence on which he relied. I do not consider that any notice need be taken of the new suggestion that further evidence might be available since he was very clearly instructed in my letter No. C/324-1.a/29 dated 20 May 1938 to produce at once all the evidence which he has."⁴⁷⁵
- 27 June 1938** **British Political Resident forwards British Political Agent's 21 June letter to the Secretary of State for India.** British Political Resident states that he concurs with the sentiments expressed in it.⁴⁷⁶
- 12 July 1938** **Foreign Office recommends to Secretary of State for India that Ruler of Qatar should be allowed to see Bahrain's Counter-claim (following its submission) and to respond to it.** Foreign Office proposes that a decision then be made on the basis of each party's claim and response:

"Under this procedure, the party who loses the case at least knows the grounds on which the decision was given, and has no opportunity of feeling that some erroneous statement, which he was able to controvert, has been relied upon in reaching a decision.

We feel, therefore, that, even though the Sheikh of Qatar may not have any more really effective arguments to advance in support of his claim, a refusal on our part to accord him the same opportunity as was given to his rival might leave him with a genuine sense of grievance attributable to this cause alone."⁴⁷⁷

⁴⁷⁴ Letter from Ruler of Qatar to Hugh Weightman, British Political Agent, 15 June 1938. BM Ann. 263, Vol. 5, pp. 1115-1116; QM Ann. III.160, Vol. 7, pp. 305-310.

⁴⁷⁵ Letter from Hugh Weightman, British Political Agent, to Lt. Col Fowle, British Political Resident, 21 June 1938. QM Ann. III.162, Vol. 7, pp. 315-318.

⁴⁷⁶ Letter from Lt. Col. Fowle, British Political Resident, to Secretary of State for India, 27 June 1938. BM Ann. 264, Vol. 5, p. 1117; QM Ann. III.163, Vol. 7, pp. 319-322.

⁴⁷⁷ Letter from C. W. Baxter, Foreign Office, to R. Peel, Secretary of State for India, 12 July 1938. QM Ann. III.165, Vol. 7, pp. 327-332.

21 July 1938 **Secretary of State for India disagrees with advice of British Political Resident and British Political Agent and instructs that the Ruler of Qatar should be permitted to see Bahrain's Counter-claim (following its submission), in order to reply to it.**

"HMG... while recognising that Sheikh of Qatar may be able to add nothing of substance to the statements he has already made, consider that on the whole it would be preferable to give him an opportunity to comment on the Bahrain reply. This would be in accordance with the normal procedures in such cases, and it is undesirable, if the eventual decision is in favour of Bahrein, that the Sheikh of Qatar should be left with a sense of grievance that he has not been fully heard. ...[P]lease communicate statement of Bahrein Government when received to Sheikh of Qatar and allow him reasonable period for his comments and for the production of any further evidence in support of his claim".⁴⁷⁸

14 August 1938 **Acting British Political Agent forwards Qatar's claim to Bahrain with a request that Bahrain submit a full and detailed Counter-claim.**⁴⁷⁹

8 November 1938 **The British Political Agent reminds Bahrain to submit its Counter-claim.**⁴⁸⁰

22 December 1938 **Bahrain submits its Counter-claim.** Counter claim presents evidence of Bahrain's sovereignty over the Hawar Islands dating back to the 18th Century.⁴⁸¹

5 January 1939 **British Political Agent forwards Bahrain's Counter-claim to Qatar.**⁴⁸²

⁴⁷⁸ Letter from R. Peel, Secretary of State for India, to Lt. Col. Fowle, British Political Resident, 21 July 1938. BM Ann. 269, Vol. 5, p. 1124.

⁴⁷⁹ Letter from Capt. Howes, Officiating British Political Agent, to the Acting Adviser to Govt. of Bahrain, 14 August 1938. BM Ann. 270, Vol. 5, p. 1125; QM Ann. III.168, Vol. 7, pp. 343-346.

⁴⁸⁰ Letter from Hugh Weightman, British Political Agent, to the Adviser to the Govt. of Bahrain, British Political Resident, 8 November 1938. BM Ann. 272, Vol. 5, p. 1127.

⁴⁸¹ Bahrain Counter-claim (in the form of a letter from Charles Belgrave, Adviser to the Govt. of Bahrain to Hugh Weightman, British Political Agent), 22 December 1938. BM Ann. 274, Vol. 5, pp. 1129-1135; QM Ann. III.174, Vol. 7, pp. 371-384.

⁴⁸² Letter from Hugh Weightman, British Political Agent, to Ruler of Qatar, 5 January 1939. BM Ann. 276, Vol. 5, pp. 1141-1142; QM Ann. 177, Vol. 7, pp. 393-396.

- 16 March 1939** British Political Agent requests that Qatar's rejoinder be submitted by end of month. British Political Agent states "...otherwise it will be assumed that you do not wish to put forward any further arguments beyond those you have already written, and the matter will at once be submitted to His Majesty's Government for decision."⁴⁸³
- 19 March 1939** Ruler of Qatar protests to British Political Agent about the time-limit being imposed.⁴⁸⁴
- 22 March 1939** British Political Agent reiterates to Ruler of Qatar the need for his claim to be submitted by the end of the month. British Political Agent states: "...you must remember that you had unlimited time in which to make your original claim which was expected to include all your arguments and evidence, and that at present you have been given an opportunity only to add any further comments that you may wish to make after seeing the Bahrain Government's reply. In other parts of the world when cases of this nature arise it is normal for such final statements as you are now preparing to be ready within two weeks or at the most a month."⁴⁸⁵
- 24 March 1939** Ruler of Qatar protests to British Political Agent that his initial claim had been made immediately on hearing of Bahrain's activities in Hawar Islands.⁴⁸⁶
- 30 March 1939** Qatar submits its rejoinder.⁴⁸⁷

⁴⁸³ Letter from Hugh Weightman, British Political Agent, to Ruler of Qatar, 17 March 1939. QM Ann. III.188, Vol. 7, pp. 437-439.

⁴⁸⁴ Letter from the Ruler of Qatar to Hugh Weightman, British Political Agent, 19 March 1939. BM Ann. 277, Vol. 5, p. 1143; QM Ann. III.189, Vol. 7, pp. 441-444.

⁴⁸⁵ Letter from Hugh Weightman, British Political Agent, to Ruler of Qatar, 22 March 1939. QM Ann. III.190, Vol. 7, pp. 445-448.

⁴⁸⁶ Letter from Ruler of Qatar to Hugh Weightman, British Political Agent, 24 March 1939. QM Ann. III.191, Vol. 7, pp. 449-452.

⁴⁸⁷ Qatar rejoinder (in the form of a letter from the Ruler of Qatar to Hugh Weightman, British Political Agent), 30 March 1939. BM Ann. 278 and 279, Vol. 5, pp. 1144-1145 and 1146-1162; QM Ann. III.192, Vol. 7, pp. 453-488.

- 20 April 1939** Bahrain clarifies in letter to British Political Agent its submission in its preliminary statement regarding property in Hawar which is subject to the laws of Bahrain. It had been stated that certain Hawar fishtraps were registered in Hawar. In fact, the fishtraps in question are not registered as they are subject to a dispute in the Bahrain Court and cannot be registered until the case, and therefore the question of ownership, has been settled.⁴⁸⁸
- 22 April 1939** British Political Agent communicates the record of the proceedings and his analysis to the British Political Resident.⁴⁸⁹
- 29 April 1939** British Political Resident forwards British Political Agent's record and analysis to the British Government in London.⁴⁹⁰
- 13 June 1939** British Government decides in favour of Bahrain's claim to sovereignty over the Hawar islands, subject to the assent of the Government of India.⁴⁹¹
- 1 July 1939** Government of India concurs in the decision of British Government.⁴⁹²
- 11 July 1939** British Government's decision is communicated to the Rulers of Bahrain and Qatar.⁴⁹³

⁴⁸⁸ Letter from Charles Belgrave, Adviser to Govt. of Bahrain, to Hugh Weightman, British Political Agent, 20 April 1939. BM Ann. 280, Vol. 5, pp. 1163-1164; QM Ann. III.193, Vol. 7, pp. 489-492. This letter does not constitute a withdrawal of evidence regarding fishtraps, as Qatar claims. Rather, it clarifies evidence already submitted that property in the Hawar Islands is subject to the courts in Bahrain. Further instances of fishtraps in the Hawar Islands owned by Bahraini subjects are cited.

⁴⁸⁹ Weightman Report – Letter from Hugh Weightman, British Political Agent, to Lt. Col. Fowle, British Political Resident, 22 April 1939. BM Ann. 281, Vol. 5, pp. 1165-1172; QM Ann. III.195, Vol. 7, pp. 497-506.

⁴⁹⁰ Letter from Lt. Col. Fowle, British Political Resident, to Secretary of State for India, 29 April 1939. BM Ann. 282, Vol. 5, p. 1173; QM Ann. III.199, Vol. 7, pp. 519-521.

⁴⁹¹ Letter from Foreign Office (London) to India Office (London), 13 June 1939. BM Ann. 284, Vol. 5, p. 1176.

⁴⁹² Letter from Deputy Secretary to the Govt. of India to Lt. Col. Fowle, British Political Resident, 1 July 1939. BM Ann. 286, Vol. 5, p. 1181.

⁴⁹³ Letters from Lt. Col. Fowle, British Political Resident, to Ruler of Bahrain and Ruler of Qatar, 11 July 1939. BM Ann. 287 and 288, Vol. 5, p. 1182 and 1183; QM Ann. III.208 and III.209, Vol. 8, pp. 37-40 and pp. 41-44.

**SECTION 3.3 Qatar's allegations of British wrongdoing cannot be considered
by the Court in the absence of Great Britain as a Party**

A. Qatar has alleged unlawful acts by Britain

375. Before examining the "formal defects" which Qatar has alleged in respect of the 1939 Award, it is necessary to confront an important issue of admissibility.

376. Qatar's Memorial alleges that Britain and Bahrain conspired to perpetrate on Qatar a fraud of historic proportions.⁴⁹⁴ This conspiracy, so Qatar alleges, consisted of manufacturing invalid evidence in Bahrain's favour, suppressing valid evidence that would have favoured Qatar, and conducting an invalid and biased arbitration. Aside from the fact that these allegations are unfounded (as will be seen in Section 3.5(B)), they are inadmissible, in that they would require the Court to examine the legality of the behaviour of a State that has not accepted the Court's jurisdiction, as well as the significant legal consequences flowing therefrom.

**B. Qatar's allegations necessarily implicate the British Government and not
only Weightman and Belgrave**

377. Qatar apparently hesitated to accuse Britain directly of complicity in the alleged conspiracy directly against Britain, preferring to proceed by implication. Qatar's Memorial goes to some lengths in its attempt to focus its conspiracy theory entirely on Sir Charles Belgrave and Sir Hugh Weightman.⁴⁹⁵ Weightman is depicted as a man of questionable probity⁴⁹⁶ and, moreover, as being dominated by the more powerful personality of Belgrave, the Adviser to the Ruler of Bahrain.⁴⁹⁷ This leads Qatar into a

⁴⁹⁴ See Section 3.3.B *infra*. See also, for example, QM paras. 5.55, 5.56, 5.57, 5.64, 5.65, 5.66, 6.50, 6.64, 6.70, 6.71, 6.81, 6.109, 6.170, 6.230.

⁴⁹⁵ See, for example, QM paras. 5.56, 6.50 and 6.71.

⁴⁹⁶ See QM para. 6.74.

⁴⁹⁷ See, for example, QM para. 6.89.

contradiction. At several places Qatar's Memorial states that Qatar does not allege that the British Government as a whole or its officials generally were involved in the conspiracy, but only one British official (Weightman).⁴⁹⁸ Yet at many other places Qatar's Memorial directly implicates Britain, the British Government, and no less than five named British officials in the conspiracy.

378. The five British officials directly impugned by Qatar are:

- 1) Lt.-Col. Trenchard Fowle, British Political Resident;⁴⁹⁹
- 2) Lt.-Col. Percy Loch, British Political Agent, prior to Weightman;⁵⁰⁰
- 3) Hugh Weightman, British Political Agent;⁵⁰¹
- 4) Abdul Razag bin Rizoogi, British Residency Agent in the Trucial States;⁵⁰²
- 5) Khan Bahador Issa Abdul Lateef Al-Sarkal, Representative of the British Government in Sharjah.⁵⁰³

379. Qatar's Memorial seeks to implicate Britain directly in the conspiracy no less than 12 times.⁵⁰⁴ For example, Qatar invokes correspondence that was exchanged in

⁴⁹⁸ See, for example, QM para. 6.71.

⁴⁹⁹ See, for example, QM paras. 6.35, 6.37, 6.116, 6.163.

⁵⁰⁰ See, for example, QM paras. 6.35, 6.37, 6.65, 6.66, 6.70.

⁵⁰¹ See QM paras. 5.56, 6.71, 6.88, 6.89, 6.90, 6.91, 6.92, 6.95, 6.109, 6.116, 6.154, 6.163, 6.170, 6.189. Qatar attacks Weightman personally on the ground that he was acting to further the interests of Britain:

"There is evidence to show that the British Political Agent in Bahrain [Weightman] was at least partly aware of, if not actively initiating or supporting Belgrave's plans, presumably to show his superiors gains in increasing the area of British influence." (QM para. 5.56.)

⁵⁰² See QM paras. 6.67, 6.70, 6.158, 6.160, 6.185, 6.186, 6.187.

⁵⁰³ See QM paras. 5.65, 6.169, 6.173.

⁵⁰⁴ See QM paras. 5.55, 5.57, 5.64, 5.65, 5.66, 5.67, 5.69, 6.64, 6.81, 6.109, 6.170, 6.230.

1936 between two senior British officials in the Gulf stating that it could suit Britain's political interests to have as much territory as possible under Bahrain's control. Referring to this correspondence, Qatar's Memorial unmistakably seeks to implicate Britain in the alleged conspiracy:

"5.57 In other words, efforts were to be made to add to the territory of Bahrain. This "plot", which began to be implemented from around 1930, and evidence which subsequently became available about the false basis of Bahrain's claims to the Hawar islands is dealt with in detail in the next Chapter."⁵⁰⁵ (Emphasis added.)

380. Qatar's Memorial also alleges that by July of 1938 "officials in the India Office ... were already *parti pris*" in favour of Bahrain in relation to the Hawar Islands arbitration.⁵⁰⁶ Qatar asserts that Bahrain's evidence submitted during 1938-1939 was accepted by "British authorit[ies]" in India and London without having been "subjected to critical examination."⁵⁰⁷ Qatar's allegations continue:

"... Qatar has already reviewed the evidence demonstrating that the British authorities in the Gulf and in London had no clear idea in 1938/39 either of the composition or of the exact location of the Hawar islands. Their ignorance was equalled only by their predisposition to give them to Bahrain in view of the supposed advantages which would accrue to Britain from such a decision."⁵⁰⁸

381. Qatar alleges that Britain and its officials were generally biased toward Bahrain and that this bias affected the validity of the 1938-1939 arbitration.⁵⁰⁹ In particular, Qatar alleges violations of the *audi alteram partem* rule,⁵¹⁰ the *nemo iudex in causa sua*

⁵⁰⁵ QM paras. 5.56 and 5.57.

⁵⁰⁶ QM para. 6.81.

⁵⁰⁷ QM para. 6.109. This statement was made by Qatar in the context of accusing Bahrain of having submitted "wholly fictitious" evidence in 1938-1939.

⁵⁰⁸ QM para. 6.230.

⁵⁰⁹ See QM paras. 6.121-140, 6.144.

⁵¹⁰ QM paras. 6.124-6.131.

rule,⁵¹¹ and the rule prohibiting bias in the decision-maker.⁵¹² Qatar's position is summed up in the conclusion of Chapter VI of its Memorial in the following terms:

"Furthermore, the procedure followed by the British was so defective that the resulting decision can only be considered a nullity ... there were clear instances of bias, both by Britain generally and by Weightman in particular, in favour of Bahrain ..."⁵¹³ (Emphasis added.)

Thus, despite its attempts to equivocate, the Qatar's Memorial's conspiracy theory expressly and repeatedly implicates Britain. Qatar is saying nothing less than that Britain colluded with Bahrain to dispossess Qatar of the Hawar Islands.

C. Qatar's allegations are inadmissible in the absence of Britain as a Party

382. These allegations have serious jurisdictional implications. According to Qatar's Memorial, the alleged participation of Britain in a ten-year conspiracy actively to defraud Qatar of the Hawar Islands achieved its objective when Britain manipulated evidence and followed improper procedures in 1938-1939 in order to award the Islands to Bahrain. In helping Bahrain prevail over Qatar, Britain was – so Qatar alleges – pursuing its own interests. These allegations, which were first raised in Qatar's Memorial on the basis of the forged documents, present an issue of admissibility which obviously could not previously have been addressed by Bahrain.

383. The corruption of a judge, *judex corruptus*, is an acknowledged ground for annulling an award. Most publicists⁵¹⁴ who have considered the matter agree that an award can be annulled if it is established, cumulatively, that (i) the arbitrator was corrupted, such that, in his decision, he pursued private ends incompatible with his

⁵¹¹ QM paras. 6.132-6.140.

⁵¹² QM paras. 6.132-6.140.

⁵¹³ QM para. 6.251.

⁵¹⁴ See, e.g., K. Carlston, The Process of International Arbitration (1946) at p. 53.

public duty; and (ii) the corrupt behaviour was a significant factor in the formation of an award such that the evidence, had it been fairly weighed and applied, would not have sustained it.

384. When a government functions as arbitrator, the allegation of *judex corruptus* relates perforce to the actions of officials and functionaries of that government, for a government can only operate through individuals. Hence the argument that a government, acting as arbitrator, might have been corrupt is not, in theory, implausible. Qatar's essential allegation on this issue is that Britain and the British Government acted as *judex corruptus* by participating in this conspiracy.

385. Qatar's factual allegation raises an acute jurisdictional problem. For the Court to consider the allegation would involve it in making judgments about the propriety and lawfulness of behaviour of the British Government. If the Court were to sustain Qatar's allegation, it would touch upon obligations that Britain owed, as a result of its behaviour, to Qatar. (And, indeed, to Bahrain as well, for Bahrain would then be deprived, by reason of the perfidy of Britain, of an arbitral award which, on the objective evidence, it could otherwise claim to have been in its favour.) Moreover, if Qatar's allegation of corruption and bias were sustained, it might, in addition to invalidating the Award, also serve as the basis for further actions by Qatar and even by Bahrain against Britain for breach of treaty rights and fiduciary duties owed to both States. The Court should therefore find this allegation inadmissible.

386. In view of the recent consideration by the Court of a case raising issues relating to the conduct of a State not party to the proceedings, namely, the East Timor⁵¹⁵ case, it is unnecessary for Bahrain now to refer to the authorities in any detail. It is sufficient to recall that in the Monetary Gold⁵¹⁶ case the Court declined to proceed to consider an

⁵¹⁵ Case concerning East Timor (Judgment), 30 June 1995, ICJ Rep. 1995, at p. 159.

⁵¹⁶ Case of the Monetary Gold Removed from Rome in 1943 (Judgment, Preliminary Question), ICJ Rep. 1954, at p. 33.

issue between Italy and the United Kingdom which turned upon the question of the legality of the conduct of Albania, a State not a party to the proceedings. Similarly, in the East Timor case the Court refused to consider, in proceedings between Portugal and Australia, the legality of the conduct of Indonesia.

387. The Court must decline to hear all the arguments about the invalidity of the British Award of 1939 because these arguments put in issue Britain's international responsibility. In the absence of Britain's consent, consideration of such a matter is impermissible. In East Timor, the Court stated that if it exercised jurisdiction, "Indonesia's rights and obligations would thus constitute the very subject-matter of such a judgment made in the absence of that State's consent."⁵¹⁷ That would also be the case if the Court were to exercise jurisdiction in respect of Qatar's allegations regarding Britain's conduct of the 1938-1939 proceedings.

SECTION 3.4 The burden of proof with respect to the validity of the 1939 Award rests on Qatar

388. As stated in paragraph 370, there appears to be no controversy as to the character of the 1939 decision. It will be recalled that the Foreign Office gave advice to the India Office, which supervised the British officials responsible for the 1938-39 adjudication, on appropriate conduct "when one is assuming an arbitral rule [sic: "role"] of this character"⁵¹⁸ (Emphasis added.) That is what Britain thought it was doing; that is what Britain did.

389. An arbitral award as such is entitled to be respected: there is a *praesumptio in favorem validitatis sententiae*.⁵¹⁹ If a party challenges an award, it has the burden of

⁵¹⁷ *Ibid.* at para. 34.

⁵¹⁸ Letter from Foreign Office to India Office, 12 July 1938. QM Ann. III.167, Vol. 7, p. 327.

⁵¹⁹ Klöckner v. Cameroon: Decision of the Ad Hoc Committee, 1 ICSID Rev. For. Investment (1986) L.J. 89.

proof. This has been the position of the Permanent Court in the Société Commerciale de Belgique case⁵²⁰ and of the International Court in the Award of the King of Spain⁵²¹ and the Guinea Bissau v. Senegal⁵²² judgments.

SECTION 3.5 Refutation of Qatar's criticisms of the 1939 Award

A. Qatar's allegation of absence of consent is unfounded

(i) Explicit Consent

390. Qatar's Memorial alleges:

"[o]bviously, there was no arbitration agreement authorising the British Government to act as arbitrator between Qatar and Bahrain in the matter of the dispute over title to the Hawar group of islands."⁵²³

The argument is wrong. Just as was the case with Bahrain,⁵²⁴ Qatar had granted, in a series of agreements over the years, a general authority to Britain, as its protecting power, to determine what boundaries it was obliged to protect.

391. Among these agreements⁵²⁵ there was a Qatari expression of consent which amply supports Britain's arbitral jurisdiction in the 1938-39 proceedings. On 12 September 1868, as a result of the unsuccessful attempt by the Doha confederation to rebel against Bahrain's authority in Doha, described in Section 2.2.G, Muhammed bin

⁵²⁰ The Société Commerciale de Belgique (Judgment), 15 June 1939, P.C.I.J. Series A/B, No. 78, pp. 160-90. .

⁵²¹ Case concerning the Arbitral Award made by the King of Spain on 23 December 1906 (Honduras v. Nicaragua), (Judgment of 18 November 1960), I.C.J. Rep. 1960 p. 192.

⁵²² Case concerning the Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal), (Judgment of 12 November 1991), I.C.J. Rep. 1991 p. 53.

⁵²³ QM para. 6.115.

⁵²⁴ British-Bahraini 1861 Treaty of Friendship. BM Ann. 8, Vol. 2, p. 110.

⁵²⁵ These agreements are more fully recalled in Section 2.2.G.

Thani signed a unilateral guarantee regarding his behaviour. One of the principal obligations that he undertook was that:

"... in the event of a difference of opinion [with Bahrain] arising as to any question, whether money payment or other matter, the same is to be referred to the Resident."⁵²⁶

The words "any question" and "or other matter" make this an unrestricted acceptance of the competence of the British Resident to decide differences between Qatar and Bahrain. Thus, from 1868, the Al-Thani accepted that all differences between them and Bahrain were to be referred to Britain for settlement.

392. The role of Britain as adjudicator of all disputes between Bahrain and Qatar was endorsed by Muhammed bin Thani's grandson, Abdullah bin Jasim Al-Thani, in 1916. On 3 November of that year, Britain and Sheikh Abdullah signed the treaty that created a State of Qatar. That treaty expressly included within its terms the unilateral undertakings of Mohammed Al-Thani of 1868:

"Whereas my grandfather, the late Shaikh Mohammed bin Thani, signed an agreement on the 12th September 1868 engaging not to commit and breach of the Maritime Peace, and whereas these obligations to the British Government have devolved on me his successor in Qatar."⁵²⁷

The obligation that had been assumed by the Al-Thani to refer to the British Resident any "difference of opinion arising as to any question" with Bahrain was, therefore, incorporated in and survived the 1916 Treaty. That treaty governed British-Qatari relations until Qatar's independence in 1971.

⁵²⁶ Aitchison's Treaties, *op. cit.*, pp. 183-184. BM Ann. 12, Vol. 2, pp.157-158.

⁵²⁷ Aitchison's Treaties, *op. cit.*, p. 258. BM Ann. 84, Vol. 3, p. 513.

(ii) Implied Consent: Participation without Protest

393. Explicit prior consent is not the only way to create jurisdiction. The Tribunal in Dubai/Sharjah Border said that "international law does not require here an excessive formalism."⁵²⁸ Qatar quotes the passage with approval.⁵²⁹ Qatar, itself, acknowledges that:

"The Judgment of the Court of 1 July 1994 in the jurisdictional phase of the present case confirms that international law does not require consents [sic] to be expressed only in the form of an arbitration agreement."⁵³⁰

Participation constitutes implied consent by operation of a type of *forum prorogatum*. In the Award of the King of Spain, the Court commented on a cognate claim made by Nicaragua with respect to the impropriety of the appointment of the arbitrator and the exercise of his jurisdiction. The Court stated:

"No question was at any time raised in the arbitral proceedings before the King with regard either to the validity of his designation as arbitrator or his jurisdiction as such. Before him, the Parties followed the procedure that had been agreed upon for submitting their respective cases. Indeed, the very first occasion when the validity of the designation of the King of Spain as arbitrator was challenged was in the Note of the Foreign Minister of Nicaragua of 19 March 1912."⁵³¹

394. It is clear, moreover, that Qatar acquiesced in the procedure that Britain followed in 1939. Qatar could have protested or remained entirely aloof. There is no indication in the record that the Ruler of Qatar ever stated that Britain had no authority or right to determine the title and boundaries in question. To the contrary, the Ruler of Qatar *sought* the ruling by Britain and then participated actively in the process. Such participation in these circumstances constituted consent.

⁵²⁸ Dubai/Sharjah Border, Award of 19 October 1981, 91 I.L.R. 1993, p. 576.

⁵²⁹ QM para. 6.114.

⁵³⁰ QM para. 6.115.

⁵³¹ King of Spain (Honduras v. Nicaragua), *op. cit.*, pp. 192, 206-07.

B. There was no British bias

395. At the very core of Qatar's challenge to the 1939 Award is its charge that Britain's self-interest caused it to conduct the proceedings with bias against Qatar. Leaving aside the inferences which Qatar derives from the fraudulent documents, the main elements of Qatar's accusations are that Britain pre-judged the question of the ownership of the Hawar Islands in 1936 without giving Qatar a proper and equal opportunity to be heard. Furthermore, as a result of this "provisional decision", which was based on fragmentary and inconclusive evidence, Qatar was treated as the claimant in the 1939 proceedings. The British official administering the proceedings colluded with the Bahrain Government Adviser to deny Qatar access to Bahrain's evidence and to give Bahrain improper access to Qatar's evidence. Motivated by its broader economic and political interests, and its long-standing relationship with Bahrain, so the argument continues, Britain conducted the 1939 proceedings in manner that favoured Bahrain and was biased against Qatar. To corroborate its accusation of British bias, Qatar relies on statements made by two British officials in the aftermath of the 1939 decision.⁵³²

396. As demonstrated in detail in Chapter 2, Qatar – perhaps overimpressed by the forged documents – has fundamentally misunderstood the commercial interests involved in the early oil industry, and therefore has concocted a theory of British bias which is utterly implausible as a matter of motivation. As shown in Section 2.3.G, British interests would have inclined it to recognising sovereignty over the Hawar Islands by Qatar, not Bahrain. In this section, Bahrain leaves aside the issue of Britain's motivation, and contends that at any rate the record in fact reveals no bias.

397. Bahrain has demonstrated the fraudulent nature of the documents upon which Qatar founds the core of its case regarding the alleged bias of British officials. The only evidence other than these forged documents consists of extracts that Qatar has selected

⁵³² See QM paras. 6.100-6.110.

from the writings – published and private – of Belgrave. None of these extracts supports the allegation of bias independently of the forged documents. Furthermore, the extracts are presented in a misleading manner, *i.e.*, with certain essential passages omitted and/or taken out of context. When viewed in their entirety and in context, these extracts in truth show no bias.

398. Qatar develops a conspiracy theory focusing on two men: Sir Charles Belgrave, Adviser to the Government of Bahrain, who is presented as nothing less than a criminal, intent on advancing Bahrain's cause by any means; and Sir Hugh Weightman, British Political Agent, and supposedly under Belgrave's influence, as his accomplice.⁵³³ Qatar's Memorial implicates four other British officials, as well as the British Government in the conspiracy.

399. This theory, if correct, would eliminate much of Bahrain's evidence in relation to the Hawar Islands. Any document that passed through Belgrave's hands should, in Qatar's view, be presumed to be suspect. As it was Belgrave who presented Bahrain's case, the entire body of evidence adduced by Bahrain during the 1938-1939 arbitration should, so Qatar contends, now to be dismissed *en bloc* as contaminated – despite the fact that that evidence is consistent with and confirmed by the public record.

400. Weightman was Britain's Political Agent for Bahrain and Qatar from 1937 to 1940. In that capacity he organised the arbitral proceedings regarding the Hawar Islands and made a preliminary assessment of the factual bases of the two Parties' claims. By characterising him as Belgrave's accomplice, Qatar today seeks a radical solution to the difficulty arising from its failure in 1938-39 to present any probative evidence beyond the fact of proximity. Qatar thus suggests that it would in fact have proved its case if its evidence had not been suppressed, if it had been given adequate time to do so, or if Britain and its officials had not misconducted themselves.

⁵³³ Qatar uses the phrase "pernicious influence" to describe the relationship. QM para. 6.89.

401. The theory is neat; like all conspiracy theories, it is designed to explain everything. It is easy to launch such accusations, but difficult to demonstrate that they are justified. Particularly serious charges like those of bad faith, deceit, and fraud require particularly serious proof. What Qatar offers today is the fruit of wishful thinking and is itself based on a real and proven fraud – *i.e.*, the 81 forgeries which Qatar submitted with its Memorial. Qatar's thesis is profoundly prejudicial to both Britain and Bahrain, who stand accused of participating in a ten-year conspiracy to deprive Qatar of its rights, and then perpetuating the conspiracy to the present day by maintaining its effects through the years. Qatar would like the Court to believe that Belgrave and Weightman were ignoble conspirators, that Bahrain's overwhelming evidence of its sovereignty over the Hawar Islands was pervasively contaminated, that Britain was biased, an actor in the conspiracy, and that Qatar had good evidence that was suppressed. Moreover, Qatar would like the Court to believe that this extraordinary manipulation remained undiscovered or ignored by the entire world for over half a century.

402. But the fact is that the alleged bases for Qatar's accusation are to be found only in the 81 forged documents. When these are removed, Qatar's charges collapse, and are exposed as nothing more than implausible speculation or preposterous interpretations of innocent documents.

403. Disregarding the forged documents, the remaining structure of Qatar's theory is built on nine extracts from Belgrave's personal diary during May 1938 and January and February 1939.⁵³⁴ These nine extracts, like most of Belgrave's diary, are banal and innocuous. They show that Weightman was one of the many people whom Belgrave met on a frequent basis while assisting in the affairs of the Bahrain Government. Even Qatar does not attempt to imply from these extracts more than that there were close

⁵³⁴ QM para. 6.72.

relations and easy access between Belgrave and the various Political Agents in Bahrain. What the extracts fail to reveal, presented in isolation as they are, is that Belgrave enjoyed equally close relations, on a reciprocal basis, and easy access with most persons of influence in Bahrain. Furthermore, Belgrave's diary makes it clear that this sort of relationship was entirely normal within the small expatriate community in Bahrain. There was nothing improper or unusual about it.

404. To mask this, Qatar's Memorial pretends that the invidious nature of the nine extracts can be divined by reading them in conjunction with an extract about Weightman from Belgrave's 1972 memoirs and three Belgrave diary entries from April 1939. The extract from Belgrave's 1972 memoirs⁵³⁵ in fact is plucked from a mundane chronological account of life in Bahrain at the outbreak of the Second World War:

"... In June 1940, when France collapsed, I cabled to [my wife] to join me, with our son, in Bahrain. They got a passage in the P & O *Strathnaver*. The voyage from England to Ceylon took over a month, during which they were attacked by bombers and chased by submarines. It was a horrible experience. Having got as far as Karachi my son, who had started measles during the long train journey from the south of India, was put into the municipal fever hospital in Karachi bazaar, not a salubrious place, but by pulling some strings and because I was Commandant of Police in Bahrain, a quasi-military post, he was admitted to the Military Hospital where I found him when I went down to Karachi to meet them.

Hugh Weightman left Bahrain for Delhi in August and subsequently became Foreign Secretary to the Government of India. I and many others much regretted his departure. Both he and, later, E.B. Wakefield, who also served in Bahrain and then in Delhi, were very valuable friends at court; they did much to keep Bahrain on the map and helped us to maintain a supply of food from India. In October there was a night attack on Bahrain by Italian aircraft, which came from the Dodecanese islands ..."⁵³⁶

⁵³⁵ QM para. 6.73.

⁵³⁶ C. Belgrave, Personal Column (1972), p. 121. QM Annex III.299, Vol. 8, p. 500.

How this reference to Weightman and Wakefield translates into evidence of bias is not explained by Qatar. It is certainly not apparent on the face of the above-quoted section.

405. Similarly, no explanation is offered for the apparently irrelevant and unconnected reference, made in the next paragraphs of Qatar's Memorial, to Weightman's personal business activities in Abu Dhabi following his retirement.⁵³⁷ Such an incongruous reference appears to be part of the pattern in Qatar's Memorial of attempting to create an atmosphere of doubt about the propriety of the innocuous behaviour of Weightman and Belgrave generally. However, without any authentic evidence to support it, the suggestion can be made only by innuendo, and does not withstand even the most superficial scrutiny.

406. Qatar's forced interpretations of the Belgrave selections culminate in three entries taken from Belgrave's diaries that, according to Qatar, "demonstrate the pernicious influence which Belgrave exercised over Weightman."⁵³⁸ (Emphasis added.) The first entry so cited is from 18 April 1939, the relevant parts of which are presented here in full:

"... Drove out to Rumaitha in afternoon to see HH [the Ruler of Bahrain]. A nice drive, took about an hour, some of the country is quite green but very short grass. We had tea by the roadside on the way back. HH [the Ruler of Bahrain] was sitting on the steps outside his little house surveying more camels & young ones, it is a small place high up & nice air. He took [sic] us up to a hill where we could see the fort at Hawar & also HW's [Hugh Weightman] launch returning from there, he went to visit the place. Discussed the succession ..."⁵³⁹

Far from revealing a "pernicious influence", a more ordinary and harmless series of events could hardly be imagined. Yet this is the best authentic evidence that Qatar has

⁵³⁷ QM para. 6.74.

⁵³⁸ QM para. 6.89.

⁵³⁹ Entries from the diary of Sir Charles Dalrymple Belgrave, 18 April 1939. Ann. 102, Vol. 2, p. 309.

presented on which it founds a claim of bias. Again, how Belgrave's chance sighting of Weightman's boat equates to any form of influence, let alone "pernicious influence", is not explained, nor is it evident.

407. The next diary extract presented by Qatar is portentously described as being "equally revealing". The day's entry is presented here in full:

"At Agency for some time in morning hearing about H's [Weightman's] trip to Hawar. It seems to have been satisfactory from our point of view. Motored to Budeya in the afternoon & had tea there, country looking quite green, lovely day. Dinner party, Young Jameson, Cubbitts, Howes, Ayars, Dr Barney, quite a good party."⁵⁴⁰

Once more, it is puzzling that Qatar could infer a "pernicious influence" from this pedestrian account of the fact that Belgrave merely listened to Weightman. Whether Weightman ought to have mentioned his Hawar trip to Belgrave or whether Belgrave should have listened to Weightman is surely of little moment, given that Weightman knew that Belgrave knew (as indeed probably the entire expatriate community in Bahrain knew) that Weightman had just visited the Hawar Islands. Belgrave had himself visited the Hawar Islands. So both men were aware of what Weightman had just observed on the Hawar Islands (indeed much of what he observed there can still be observed by any visitor today). Belgrave's conclusion that the trip seemed to have been satisfactory is clearly Belgrave's independent judgement.

408. As the apotheosis of its bias and conspiracy allegation, Qatar points to a passage from Belgrave's diary:

"At Agency for some time in the morning, discussed the Hawar claim, saw HW's letter regarding the whole thing, our case looks strong."⁵⁴¹
(Emphasis in Qatar's Memorial.)

⁵⁴⁰ Entries from the diary of Sir Charles Dalrymple Belgrave, 20 April 1939. Ann. 102, Vol. 2, p. 309.

⁵⁴¹ QM para. 6.90.

On this, Qatar comments:

"... There can be no more glaring illustration of bias in favour of the Bahraini claim to Hawar during the 1930s than is provided by this episode."⁵⁴² (Emphasis added by Qatar.)

409. In fact, the passage extracted by Qatar from Belgrave's diary was significantly shortened. It should have read:

"At Agency for some time in the morning, discussed the Hawar claim, saw HW's [Hugh Weightman] letter regarding the whole thing, our case looks strong, Abdullah bin Jassim has no argument except that the islands are close to his shore."⁵⁴³ (Emphasised passage omitted from quotation in Qatar's Memorial.)

410. This passage is presented as the apex of Belgrave's pernicious influence over Weightman and of Weightman's bias in favour of Bahrain. Yet two aspects of this passage merit immediate attention. The first is that the Ruler of Qatar and his advisers had themselves spoken privately about the case with Weightman on several previous occasions.⁵⁴⁴ In the nature of his role, Weightman could be expected to have precisely this kind of contact. He could hardly be sequestered for the many months of the arbitration any more than could Belgrave. This kind of contact was inevitable in the discharge of his duties. What is significant is that the extract demonstrates that Weightman was speaking to both parties – who were not speaking to each other. Thus the equality of the parties was maintained.

411. Secondly, Belgrave's conclusion that Bahrain's case was strong is clearly predicated on the observation in the last phrase of the passage – notably omitted by Qatar – that the Ruler of Qatar had "no argument except that the islands are close to his

⁵⁴² QM para. 6.91.

⁵⁴³ Entries from the diary of Sir Charles Dalrymple Belgrave, 22 April 1939. Ann. 102, Vol. 2, p. 309.

⁵⁴⁴ See Section 3.2.

shore." It is not surprising that this phrase was omitted by Qatar. Even were it possible, *arguendo*, to discern in the innocuous events described above a "pernicious influence" exercised by Belgrave, indeed even if Belgrave had read Weightman's report, neither of these events could have affected the outcome of the arbitration. The fact remains that in 1938-1939, there was no authentic evidence to support Qatar's claim to the Hawar Islands, just as there is none today.

412. If the forged documents are disregarded, and the unsupported interpretation of "pernicious influence" on the part of Belgrave is set aside, the few remaining authentic pieces of evidence adduced in Qatar's Memorial to supplement Qatar's forgery-based theory of bias and conspiracy are revealed as marginal and trivial. Beyond insinuation and unfounded extrapolations, there is nothing to show that British officials were biased in the conduct of the arbitration.

413. Finally, Bahrain notes the utter implausibility of Qatar's theory of British bias. Qatar had awarded an oil concession in its territory to a British company, while Bahrain had awarded a concession to an American company. (See Section 2.3.G.) If the Hawar Islands had been awarded to Qatar, Britain would have automatically benefited from the Qatar oil concession extending to the islands. A plausible conspiracy theory would, therefore, have the British Government plotting against Bahrain and in favour of Qatar, and not *vice versa*. It would have had Britain conspiring to give Bahraini territory to Qatar and not Qatari territory to Bahrain. The internal logic of Qatar's conspiracy theory is as implausible as is the documentary evidence on which it rests. There is no evidence that Britain abused its power. To the contrary. It rendered the correct legal decision.

C. There was no violation of *audi alteram partem*

414. Qatar submits, in its Memorial, that a "principal" rule for arbitrations is:

"the rule that both parties must have a proper and equal opportunity to present their case [sic] at all stages (the *audi alteram partem* rule)."⁵⁴⁵

415. Bahrain takes no issue with this general formulation of the principle. The parties disagree only as regards its implementation.

416. Qatar first contends that Britain did not observe the principle in 1936. It is common ground that the decision-maker in 1939 – three years later – was the same British Government that had continuously exercised protecting functions by virtue of a series of treaties and agreements dating from 1820. When States parties select as their arbitrator another State that has other and possibly overlapping relations with each of them severally, the appointed State will inevitably continue to interact with each of the States as circumstances require. It would be absurd if each such interaction, taking place years before the arbitration and, indeed, before the idea of an arbitration of the issue had even been conceived, gave rise to the nullity of the ultimate award because it did not involve the other State and hence violated the *audiatur* rule. Such a view would require the arbitrator State, if it had the slightest forethought that an arbitration might take place, to transform every exchange with either party, long before any arbitration proceedings had commenced, into an adversarial procedure in which the other party had a full opportunity to participate. If the arbitrator State does not have that degree of prescience (and who would?), then any subsequent award will constitute a violation of the *audiatur* rule, because it will emerge retrospectively that the arbitrator had not treated as adversarial all contacts prior to the initiation of the arbitral procedure.

417. Yet this is precisely the absurdity that Qatar proposes. It takes the view expressed by Britain in 1936, calls it a "provisional decision," implying that it was part of the 1939 procedure, and then claims that this 1936 "provisional decision" nullifies the

⁵⁴⁵ QM para. 6.122.

1939 award, because it violated, in 1936, a supposed *audiatur* obligation that reaches forward to 1939.⁵⁴⁶ Thus, Qatar asserts:

"[f]rom the description of the procedures followed by the British authorities in the years leading up to the formal decision of 11 July 1939, it is abundantly clear that this principle was not observed."⁵⁴⁷

The so-called "provisional decision" in 1936 was that the Hawar Islands belonged to Bahrain, a conclusion that would hardly have seemed controversial for anyone familiar with the history of the region. Moreover, such a conclusion was a necessary function for Britain, given its protective obligations with respect to Bahrain and the fact that it was responding to a request for clarification from an oil company engaged in commercial negotiations with Bahrain (see Section 2.3.G.(iv)). Britain had to decide, in this context, what were the territories of Bahrain and to inform the oil company, and Bahrain, of its view in this regard. Yet Qatar seeks to transform this routine and conventionally necessary exchange into a violation of the *audiatur* rule which must annul the 1939 award.

418. Consider Qatar's argument:

"The Court will recall that, in that year [1936], Bahrain submitted for the first time a formal claim to the Hawar islands. The British authorities did not even inform the Ruler of Qatar that Bahrain had made such a claim. Instead, and again without informing Qatar, the British Government, on the advice of its representatives in the Gulf, made a "provisional decision" in favour of the Bahrain claim to Hawar. They do not even appear to have informed the Ruler of Qatar in 1936 that they had made such a "provisional decision." There was not even an appearance of affording Qatar an opportunity to present its case before the "provisional decision" was reached in 1936. There could hardly be a more flagrant case of a failure to observe the fundamental rule of fairness in quasi-judicial procedures. As Qatar has already submitted, the procedures were

⁵⁴⁶ QM para. 6.125.

⁵⁴⁷ QM para. 6.126.

thus fundamentally flawed from the outset by the action taken in 1936."⁵⁴⁸

This is a specious argument. What was done in 1936 was proper and lawful as a discharge of Britain's obligations. It was not part of the 1939 procedure, which had not even been conceived at the time. To argue that Britain's response in 1936 was subject to arbitral standards that applied in 1939 would create a need for international actors to have perfect clairvoyance, lest acts quite properly performed at the time be annulled subsequently because later events might dress them with a quite different appearance.

D. Britain violated no obligation in its assignment of the burden of proof

419. Qatar alleges that Britain's allocation of the burden of proof to Qatar in the proceedings leading to the 1939 decision constituted both a manifestation of bias and a violation of the *audiatur* rule. The issue of bias has been dealt with under Sub-Section B. above. Bahrain will address here only the argument that assignment of burden of proof violates the *audiatur* principle.

420. The various documents which Qatar invokes are internal documents in which the British authorities, in what were in effect the arbitral tribunal's deliberations, expressed the view, in the course of the proceedings, that the obvious preponderance of evidence supported Bahrain's position. The problem was not that a burden of proof was placed on Qatar, but that, then and now, Qatar was simply unable to adduce any credible and non-fraudulent evidence that would show that it was entitled to the Hawar Islands.

421. A tribunal is competent to state where the burden of proof lies. All the indications of the procedure followed in connection with the 1939 Award are that the general principle of *actori incumbit probatio* was applied. None of the authentic documents which Qatar has adduced proves the contrary.

⁵⁴⁸ QM para. 6.126.

422. Members of any tribunal may certainly remark to each other in the course of a proceeding that one side is not presenting a credible case and may even ask that side specific questions to draw its attention to the problem. They may, in their own thinking, take one of the parties' contentions as a hypothesis and test it against the evidence that has been adduced. To suggest that the careful and deliberate process of evolving a decision implies a bias or an unfair imposition of the burden of proof is to reveal a complete misunderstanding of the judicial process. Nor is Qatar's view supported by any authority.

E. There were no procedural improprieties with regard to hearings or witnesses

(i) Oral hearing

423. Qatar argues that "there was no oral hearing and no opportunity to examine or cross-examine witnesses as to matters of fact."⁵⁴⁹

424. There is no absolute rule that all litigation must necessarily involve an oral hearing. Whilst it is true that in contentious cases before the Court normally involve oral as well as written proceedings, this is not necessarily the case in advisory opinion proceedings (see the Rules of the Court, Article 105(2)(c)), even though such proceedings may often involve points of contention between States. There are, moreover, other international tribunals – especially the administrative tribunals of international organisations – which regularly dispense with oral proceedings. Yet there has never been any suggestion that the absence of such hearings involves any procedural irregularity or injustice.

425. Also, as need hardly be said, if Qatar had wished to produce witnesses and present oral arguments during the 1938-1939 proceedings, it could have made a request

⁵⁴⁹ QM para. 6.88.

to do so, but it did not. Reference should be made especially to the letter from the Ruler of Qatar to the British Political Agent, of 30 March 1939, and the accompanying comments by the Ruler on the statement made by Bahrain.⁵⁵⁰ The latter document concludes with the following sentence:

"Now that I have explained my comments and remarks to Your Excellency as fully as is required by the circumstances of this case, I am confident that His Majesty's Government will stand impartially in this matter" (Emphasis added.)

426. It is significant that the reproduction of the Ruler's statement in the annexes to Qatar's Memorial stops just short of this paragraph⁵⁵¹ and thus deprives the Court of the opportunity of appreciating the extent to which Qatar accepted at the time the propriety of the proceedings conducted by Britain.

(ii) Cross-examination of witnesses

427. The same reticence marks the treatment by Qatar of the evidence offered by Bahrain in the letter of 22 December 1938 from the Adviser to the Government of Bahrain to the British Political Agent.⁵⁵² That letter referred to a petition "signed by the leading men of Hawar". The petition was attached to the letter. All "the leading men" were named. Fourteen of them impressed their thumbprints, three of them signed the petition and two of them attached their seals. Qatar cannot say that it was unaware in 1939 of the petition's existence and of the fact that there were then witnesses who were willing to testify to Bahrain's presence and authority in the Hawar Islands. Qatar could have asked to cross-examine them, but it did not do so. It cannot now be heard to complain that it was given no opportunity of cross-examination.

⁵⁵⁰ See BM Vol. 5, Ann. 278 and 279.

⁵⁵¹ See QM, Vol. 7, Ann. III.192, p. 467.

⁵⁵² BM Ann. 274, Vol. 5, p. 1129.

F. Reasons

428. Lastly, Qatar devotes a section to "the legal significance of the fact that the British decision of 11 July 1939 was unsupported by reasons."⁵⁵³ It is, of course, true that the formal letter from the British Political Resident in the Persian Gulf to the Ruler of Qatar of that date did no more than communicate the decision of His Majesty's Government that the Hawar Islands belonged to Bahrain and not to Qatar. But that is not to say that the decision was reached without reasons. It is important to recall the detailed assessment of the positions of the parties in the letter of 22 April 1939 from the British Political Agent in Bahrain to the British Political Resident in the Persian Gulf,⁵⁵⁴ which would certainly have sufficed as a statement of reasons had it, or its contents, been made known to the Ruler of Qatar. The fact that it has since become known to Qatar (as its reproduction in the Qatar Annexes shows) renders Qatar's objection to the summary nature of the letter of 11 July 1939 formalistic.

429. In any event, it is necessary to take into account in this connection the fact that the 1939 decision belonged to the special genre of arbitrations conducted by Heads of State and Government. When two governments selected as their arbitrator the head of a foreign government, it was not unexpected, in the relevant period, that elaborate juridical reasons would not be delivered with the Award. Thus, we find in the boundary case between Bolivia and Peru in 1909, an award by the President of the Argentine Republic of one-half a page.⁵⁵⁵ The award of Victor-Emmanuel III, the King of Italy, in the Guiana Boundary case was two and one-half pages long.⁵⁵⁶ The award in the Barotseland Boundary case was also two and one-half pages long.⁵⁵⁷ The Cordillera

⁵⁵³ QM para. 6.141.

⁵⁵⁴ QM Ann. III.195, Vol. 7, p. 499.

⁵⁵⁵ Boundary Case Between Bolivia and Peru (Bol. v. Peru) 11 U.N. R.I.A.A. 133 (1909).

⁵⁵⁶ The Guiana Boundary Case (Braz. v. Great Britain) 11 U.N. R.I.A.A. 11 (1904).

⁵⁵⁷ The Barotseland Boundary Case (Great Britain v. Portugal) 11 U.N. R.I.A.A. 59 (1905).

case between Argentina and Chile, which was decided by Edward VII, was one and one-half pages long; the report of the Tribunal he appointed was five pages long.⁵⁵⁸

430. Finally, it should be emphasised that Qatar did not, until the present proceedings, invoke the lack of reasons as a ground for challenging the validity of the 1939 decision. When the Ruler of Qatar, in his letter of 4 August 1939 to the British Political Resident in the Persian Gulf,⁵⁵⁹ complained of the decision and reserved his rights to the Hawar Islands, he did not challenge the validity of the decision on the grounds of any insufficiency of reasons. His position in his letter of 18 November 1939⁵⁶⁰ was the same. The fact that the complaint about the lack of reasons has not been made until a time when the reasons have become available only serves to emphasise the formality and lack of substance in Qatar's contention; Qatar's complaint was not that there were no reasons, but that it did not like them.

431. It is at this point appropriate to return to a matter to which brief reference was made at the beginning of this Chapter (see paragraphs 371 and 372), namely, the possibility that Qatar may contend that the 1939 decision is not an arbitral or quasi-judicial decision, but is, rather, some kind of a political decision. As already indicated, Bahrain does not consider that it is appropriate at this stage of the case to enter into discussion of a possibility which has not been expressly developed by Qatar. However, Bahrain reserves the right, should the matter ever become an issue in the case, to contend that if the 1939 decision is regarded as not being arbitral or quasi-judicial, then it is a valid and authoritative political decision to which the requirement of a "reasoned" judgment does not apply.

⁵⁵⁸ The Cordillera of the Andes Boundary Case (Argentina v. Chile) 9 U.N. R.I.A.A. 29 (1902).

⁵⁵⁹ QM Ann. III.211, Vol. 8, p. 50.

⁵⁶⁰ QM Ann. III.213, Vol. 8, p. 62.

SECTION 3.6 The 1939 Award is confirmation of a settled state of affairs

432. The 1939 Award confirmed that Bahrain's sovereignty over the Hawar Islands was already a settled state of affairs by 1938. Bahrain believes it appropriate to recall the principle stated in the Grisbadarna case:

"dans le droit des gens, c'est un principe bien établi, qu'il faut s'abstenir autant que possible de modifier l'état des choses existant de fait et depuis longtemps."⁵⁶¹

"[It is a settled principle of the law of nations that a state of things which actually exists and has existed for a long time should be changed as little as possible.]"

In the Temple of Preah Vihear Judgment, then Vice-President Alfaro in a separate opinion observed:

"A State bound by a certain treaty to another State must rest in the security that a harmonious and undisturbed exercise of the rights of each party and a faithful discharge of reciprocal obligations denote a mutually satisfactory state of things which is permanent in character...."⁵⁶²

433. This clear policy is pertinent to the issue of the Hawar Islands. Long before the 1939 Award and continuously since then, Bahrain has remained in full possession of, and has exercised full sovereignty over, the Hawar Islands to the degree required by their physical character. Respect for the Grisbadarna principle is even more compelling when, as here, it may be demonstrated that the decision was eminently well-founded in substance, as Bahrain has shown in Chapter 2.

⁵⁶¹ Affaire des Grisbadarna 11 U.N. R.I.A.A. (1909) 153, 161.

⁵⁶² Case Concerning the Temple of Preah Vihear (Cambodia v. Thailand), (Judgment of 15 June 1962), I.C.J. Rep. 1962, at p. 42.

SECTION 3.7 The special status of decisions establishing boundaries

434. The norm of stability and finality of boundaries is so important to the international system that it may legitimately be considered to have a special status. Considering that the relevant stakes are so often measured in life-or-death terms, this is hardly unwarranted. The rule is that if States have resolved a border dispute through some form of legally cognisable process, it must be presumed that the dispute is resolved and the border permanent. Henceforth, it "runs with the land." The special status of this norm is reflected in the Vienna Convention, Art. 62(2)(a) of which provides that the concept of *rebus sic stantibus* does not apply to boundary treaties. In the present case, a disturbance of the 1939 Award, now almost 60 years old, could open a veritable Pandora's Box as other Gulf States might be incited to revive ancient – but not forgotten – quarrels. This would raise a spectre of incalculable danger, because there is hardly a single border in the region which someone does not consider iniquitous. The Court has itself reaffirmed "the fundamental principle of the stability of boundaries."⁵⁶³

435. Bahrain's position is moreover reinforced by the principle of *uti possedetis*, which holds that countries emerging from colonial rule into independence accept existing colonial borders as inviolable. In the case of Bahrain and Qatar, the analysis is simplified by the fact that both countries were protectorates of Britain, and both acceded to full independence in 1971. At that moment, Britain's position was clear and long-established: the Hawar Islands belonged to Bahrain, as acknowledged in the 1938-1939 arbitration and reflected on maps issued by the British Government since then.⁵⁶⁴

436. In sum, at the time of independence the issue of the Hawar Islands was closed.

⁵⁶³ Libya/Chad, ICJ Rep. 1994 at 37, para. 72, and the authorities there cited.

⁵⁶⁴ See, e.g., 1972 UK Ministry of Defence map, between BM pp. 163-164.

437. The International Court of Justice recognised in Frontier Dispute (Burkina Faso/Mali) that *uti possedetis* is a "general principle" and a "rule of general scope" in the case of decolonisation.⁵⁶⁵ In the Cairo Declaration of 1964, the member States of the Organisation of African Unity undertook "to respect the frontiers existing on their achievement of independence."⁵⁶⁶

438. The focus of those who have reservations about the general contemporary applicability of the *uti possedetis* principle is that one should avoid "drawing borders so that individuals will not simply be part of an oppressed minority in a new state."⁵⁶⁷ That concern would only arise if the Hawar Islands were taken from Bahrain and given to Qatar. The residents of the Hawar Islands have long formed a heterogeneous group of Bahrainis, integrated in Bahrain. There is no minority group. Qatar has not sought to show the contrary. It cannot.

SECTION 3.8 Qatar claims falsely to have maintained its challenge to the British Award since 1939

439. Qatar's Memorial claims that Qatar maintained its challenge to the British Award continuously since 1939.⁵⁶⁸ This claim is not true.

440. A close reading of Qatar's Memorial reveals that Qatar itself counts a total of only six protests made by Qatar to the British Award of 1939.⁵⁶⁹ Of these, three were

⁵⁶⁵ Frontier Dispute (Burkina Faso/Mali), ICJ Rep. 1986, p. 565.

⁵⁶⁶ O.A.U. Resolution on Border Disputes, AGH/RES.16(I).

⁵⁶⁷ See, e.g. S. Ratner, "Drawing a Better Line: *Uti possedetis* and the Borders of New States," (1996), 90 AJIL 590 at 612.

⁵⁶⁸ QM paras. 6.239-6.243.

⁵⁶⁹ August 1939, November 1939, June 1940, July 1946, February 1948 and April 1965. Paragraph 6.245 of Qatar's Memorial makes vague and unsubstantiated reference to "further protests" from the two Rulers in the early 1950s. Bahrain is uncertain to what this refers.

made within the first year following the Award. Of the remaining three, two were made during 1946-1948 as part of Qatari responses to British inquiries related to the 1947 British maritime delimitation. The final protest noted by Qatar was in 1965, again in response to British inquiries related to the maritime delimitation.

441. Thus, after 1940, Qatar was silent about the Award and the Hawar Islands for 7 years and after 1948 for a further 17 years. During the 25 years between 1940 and 1965 – by Qatar's own account – Qatar made three protests against the Award. This can hardly be viewed as constituting "continuous protests"⁵⁷⁰ against the Award that "repeatedly asked for its reconsideration",⁵⁷¹ as alleged in Qatar's Memorial. Qatar has attempted to downplay its failure to protest against the Award by commenting that the matter "became rather more quiescent in the 1950s."⁵⁷² However, a more convincing explanation can be found in the Report on Qatar from the British Political Agency dated 5 December 1939:

"The Shaikh of Qatar is protesting to the British Govt. against their decision that Hawar belongs to Bahrain. As regards an early delimitation of a boundary the Ruler [of Qatar] takes the somewhat "naive" view that as Hawar belongs to Qatar the point cannot arise.

The Ruler [of Qatar]'s real conviction is that he must ultimately abide by the decision of H.M.G."⁵⁷³ (Emphasis added)

442. Qatar claims that its 1965 protest over the Hawar Islands and the 1939 Award – which led directly to the present dispute between the Parties over the Hawar Islands – arose from a sincere belief, held by Qatar since 1939, that the British Award was faulty. Bahrain repeats that Qatar's 1965 claim was nothing more than a tactical counter to

⁵⁷⁰ QM para. 6.243.

⁵⁷¹ QM para. 6.243.

⁵⁷² QM para. 6.246.

⁵⁷³ Report on Qatar, British Political Agency, 5 December 1939. BM Ann. 292, Vol. 5, pp. 1190-1194.

Bahrain's continuing claim to the Zubarah Region. This is demonstrated through the statements of the Ruler of Qatar himself:

- 1) From 1948 until 1965, Qatar voiced no interest in the Hawar Islands or the 1938-1939 British arbitration,
- 2) In February 1961, shortly before the revival of Qatar's claim, the Ruler of Qatar informed the British Political Resident that "he did not contest our (the British) decision on Hawar";⁵⁷⁴ and
- 3) Later in 1961, the Ruler of Qatar changed his position and told the British Political Agent that "if the (Ruler of Bahrain) persisted in pursuing his claim to Zubara he for his part would raise the question of Hawar Island."⁵⁷⁵

443. Thus, Qatar's current claim to the Hawar Islands is properly understood as a tactical response to Bahrain's genuine and continuous claim to the Zubarah Region (see Section 2.14 of Bahrain's Memorial and Chapter 4 below). The use by Qatar of forged documents as virtually its only evidence to support its claim in the case currently before the Court is in this light entirely consistent with what the Ruler of Qatar's threats in his discussion with the British Political Agent in 1961.

⁵⁷⁴ See BM para. 501.

⁵⁷⁵ See BM para. 502.

CHAPTER 4

BAHRAIN'S RIGHT TO SOVEREIGNTY OVER THE ZUBARAH REGION REMAINS INTACT

444. Qatar's Memorial rejects Bahrain's claim to sovereignty over the Zubarah Region on both factual and legal grounds. On the one hand, Qatar asserts that since the time of the 1868 agreements "which formally recognised the separation between Qatar and Bahrain ... Qatar has had full control" and sovereignty over Zubarah.⁵⁷⁶ On the other hand, Qatar argues that Zubarah's incorporation into Qatar was "repeatedly and explicitly confirmed by the Turks and the British from the 1870s" and that Bahrain itself had "on many occasions recognised Qatar's sovereignty over Zubarah ..." and for many years has "made no mention of any claim that it might have had to Zubarah."⁵⁷⁷

445. As has been seen in Chapter 2, Qatar's contention to the effect that its "statehood" was recognised in 1868 is a gross rewriting of history, and its allegation of full control and sovereignty over Zubarah is flatly contradicted by the historical record. It is unnecessary to repeat that demonstration here.

446. For present purposes, it is sufficient to stress that Qatar is not in lawful possession of Zubarah, and that Bahrain has never abandoned its right, nor lost it by any legal process.

⁵⁷⁶ QM para. 8.58.

⁵⁷⁷ QM para. 8.59.

SECTION 4.1 In accordance with a legal principle explicitly acknowledged by Qatar itself, Bahrain's sovereignty over Zubarah was not lost in 1937

447. The circumstances of Qatar's armed attack on Zubarah in 1937 were related in Bahrain's Memorial (Section 2.13).

448. Bahrain notes with approval the endorsement in Qatar's Memorial of the principle that:

"aggression and hostile occupation is clearly unsupportable in international law and would have no basis in law. As stated in Oppenheim:

'The principle *ex iniuria ius non oritur* is well established in international law, and according to it acts which are contrary to international law cannot become a source of legal rights for a wrongdoer.'

In support of this proposition, the learned authors point out that 'The ICJ has repeatedly held that a unilateral act which is not in accordance with law cannot confer upon a State a legal right'.⁵⁷⁸ (Footnotes omitted.)

449. This is consistent with Bahrain's argument, at Section 5.1 of its Memorial, that Qatar's armed conquest did not enable Qatar to acquire lawful title to the Zubarah Region. Zubarah therefore lawfully remains under Bahrain's sovereignty.

SECTION 4.2 Bahrain has never acquiesced in Qatar's conquest of Zubarah, nor has Qatar's claim to sovereignty ever been acknowledged by a binding decision

450. Bahrain has been persistent in its efforts to have its grievance heard. Notwithstanding this, Bahrain's sovereign rights in the Zubarah Region have never been

⁵⁷⁸ QM para. 5.59.

adjudicated. Bahrain reiterates its submission that the Court should repair the illegality that Qatar committed in 1937.

451. The history of Bahrain's unsuccessful attempts to reverse the effects of Qatar's use of armed force against Bahrain in the Zubarah Region in 1937 is summarised in Bahrain's Memorial at Section 2.14. That pleading noted no fewer than 24 officially recorded protests and claims in relation to the Zubarah Region made by Bahrain to Britain and Qatar between 1937 and 1961.⁵⁷⁹ These included:

- the 6 July 1937 protest by Bahrain to Britain against the Al-Thani attack on Zubarah and the Naim-led tribal Confederation;
- Bahrain's embargo of Qatar from 1937-1944 in protest against Qatar's 1937 armed attack;
- further protests and sovereignty claims by Bahrain to Britain during 1939;
- Bahrain's participation in the mediation of the Zubarah dispute by Britain during 1943-1944 in response to Bahrain's repeated protests and claims;
- Bahrain's signature of the ultimately unsuccessful 1944 Bahrain-Qatar Agreement on the Zubarah Region;
- negotiations with Qatar from 1944-1946 regarding the implementation of the 1944 Agreement and the Zubarah dispute itself;
- Bahrain's repeated sovereignty claims to Zubarah to Britain and Qatar during 1944-1945;
- protests and sovereignty claims made by Bahrain in 1946, 1947, and 1948 in relation to Zubarah;
- Bahrain's direct overtures to the British Government on the Zubarah issue through its London lawyer in 1948;
- Bahrain's direct communications to the British Foreign Minister on the Zubarah issue in 1948;
- Bahrain's repeated protests and claims prompted Britain to try to mediate another solution with Qatar from 1949-1950;

⁵⁷⁹ See BM paras. 295-336.

- the unsuccessful 1950 Bahrain-Qatar oral agreement on the status of Zubarah;
- Bahrain's 1950 protest over Qatar's breach of the 1950 oral agreement;
- Bahrain's instigation of further British involvement in the dispute in 1952;
- Bahrain's March 1953 protest against Qatar's activities in Zubarah;
- the June 1953 claim presented by Bahrain to the British Minister of State for the Foreign Office;
- Bahrain's protest and assertion of sovereignty in relation to Zubarah in November 1953;
- Bahrain's claim to Zubarah in January 1954;
- Bahrain's participation in April 1954 in a meeting on the Zubarah issue between the Ruler of Bahrain and the British Political Resident;
- Bahrain's participation in the unsuccessful British mediation of May 1954;
- Bahrain's claim to Zubarah in May 1957;
- Bahrain's continuous reference to and pressing its claim to Zubarah from 1957-1960, as officially recognised by Britain;
- Bahrain's continued claim against Zubarah in the context of the seabed discussions that started in 1960; and
- Bahrain's claim to Zubarah in 1961.

452. Thus, in the period following the attack on Zubarah in 1937 and prior to the independence of Bahrain and Qatar in 1971, Bahrain repeatedly attempted to bring the matter before the British Government but was repeatedly rebuffed. Qatar's quickly abating objection to the 1939 Hawar Islands Award (see Section 3.8 above) contrasts sharply with Bahrain's efforts to have its rights to the Zubarah Region restored – rights which have never been taken from Bahrain by any legal process. Britain's unsympathetic attitude seems to have had geopolitical motives, in the sense that Britain's officials feared that the re-establishment of Bahrain's authority in Zubarah could be disruptive. Whatever the merits of this reasoning, or of such other

considerations as may have underlain the refusal to hear Bahrain's complaint,⁵⁸⁰ they were not legal in nature. Britain did not reject Bahrain's claims, but refused to hear them.

453. Bahrain has maintained its position in relation to the Zubarah Region during the mediation of H.H. The King of Saudi Arabia. The Court will recall Bahrain's insistence, in the face of Qatar's opposition, that sovereignty over Zubarah be included as one of the issues in the present case.

454. Bahrain's sovereignty over Zubarah could not have been lost by Qatar's armed attack in 1937. Nothing has happened since then to effect a change of sovereignty in favour of Qatar.

⁵⁸⁰ The British Government had approved the Qatari Oil Concession of 1935 granted to a British-led consortium, PCL (see BM paras. 240-247). The territory included in the concession agreement was not defined with any degree of precision. It was described as [North of the line, which includes the islands of Bahrain, the Qatar peninsula, parts of Hasa]. See Section 2.3.G for a discussion of Britain's interest in having as much territory included within "Qatar" for this reason.

PART II – THE MARITIME DELIMITATION

455. Bahrain's position concerning the maritime delimitation is set out in Part Two of Bahrain's Memorial.⁵⁸¹ The maritime boundary proposed by Bahrain is shown on Map 1.⁵⁸² Nothing in Qatar's Memorial⁵⁸³ has led Bahrain to alter its position in any respect. For this reason, Bahrain considers it unnecessary to repeat its position here. In this Part of the Counter-Memorial, Bahrain will limit itself to a critical analysis of the arguments relating to maritime delimitation contained in Qatar's Memorial and to a demonstration that the maritime boundary claimed by Qatar is fundamentally inconsistent with the international legal principles and rules pertaining to maritime delimitation.

456. The Parties' Memorials reveal a number of points – some extremely significant – on which the Parties agree. In order to avoid unnecessary debate, Bahrain considers it important to identify these points and to define, with respect to each, the precise extent of the Parties' agreement. This is the purpose of Chapter 5 of this Part. In the following Chapters, Bahrain will present its critical analysis of Qatar's arguments and claims in relation to the maritime delimitation.

⁵⁸¹ BM pp. 245-305.

⁵⁸² Evidence which has recently come into Bahrain's possession demonstrates that the six pearling banks of Abu Haqul, Al Waadi, Hayr Abu Ath Thama, Naywah Al Amari Al Shamaliyah, Shiquita, and Shutayah, which were previously believed to belong to Saudi Arabia, in fact belong to Bahrain. The names of these pearling banks are accordingly shown in red on Map 1 and all other relevant maps in this Counter-Memorial. This new evidence does not affect the location of the maritime boundary between Bahrain and Qatar claimed by Bahrain.

⁵⁸³ QM pp. 209-306.

SECTION 5.4 The delimitation is to be effected according to the contemporary law of maritime delimitation

464. The Parties agree that, since neither the 1958 Geneva Conventions nor the 1982 Convention is in force as between them, the maritime delimitation must be effected according to the principles and rules of customary international law, as found in the practice of States, in decisions of the International Court of Justice and of international arbitral tribunals, and in those provisions of the 1958 Geneva Conventions and the 1982 Convention which express rules of customary law.

465. Bahrain and Qatar also agree that the delimitation should be effected in accordance with contemporary customary international law, and not as it may have existed at given moments in the past. Qatar's Memorial states that the maritime boundary should be determined "under present international law".⁵⁹⁷ Bahrain agrees.⁵⁹⁸ In the light of the considerable and rapid changes relating to the law of the sea which have taken place in recent decades, the Parties' agreement on this point is extremely important: the maritime boundary must be delimited in accordance with contemporary concepts, a contemporary vocabulary and contemporary rules, and not in accordance with those of the past.

466. Finally, the Parties agree as to the substantive content of the applicable law.

467. In the southern sector, where the delimitation to be effected is one between two territorial seas, the Parties agree that the applicable law is to be found in the customary rule which is set out in Article 15 of the 1982 Convention, and which was previously set out in Article 12 of the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone.⁵⁹⁹ This rule provides that the delimitation exercise should be effected

⁵⁹⁷ QM para. 11.2. See QM paras. 11.18, 11.36, 12.16.

⁵⁹⁸ BM para. 563.

⁵⁹⁹ BM para. 609; QM para. 11.36.

in two stages. The starting point should be the equidistance line, which should then be adjusted, if necessary, in the light of whatever special circumstances or historic rights might obtain.⁶⁰⁰

468. The Parties also seem to agree that the low-tide elevations in the disputed area are susceptible to appropriation and are subject to the sovereignty of one or the other. The Parties disagree, however, with respect to the question of which of them has sovereignty over two of the low-tide elevations, Fasht ad Dibal and Qit'at Jaradah.

469. As to the northern sector, where the maritime boundary will separate the two States' respective continental shelves and superjacent waters, the Parties agree that whether one is concerned with delimiting continental shelves, fishing zones, exclusive economic zones or a single maritime boundary, and whether the relevant coasts are opposite or adjacent, a solution should be found which is equitable in the light of the legally relevant factors in each given situation.⁶⁰¹ This is accomplished by taking the equidistance line as a starting point and adjusting it if legally relevant factors require this in order to achieve an equitable result.

470. The Parties thus agree that three legal formulations are essentially identical: first, the rule in Article 15 of the 1982 Convention governing territorial sea delimitations either as a treaty rule or as a customary law rule; second, the equidistance-special circumstances rule in Article 6 of the 1958 Convention governing continental shelf delimitations as a conventional rule; and, third, the customary rule of delimitation according to equitable principles governing all other delimitations (*i.e.*, continental shelf delimitations not governed by the 1958 Convention, fishing zone or exclusive economic zone delimitations, or delimitations of a single maritime boundary).

⁶⁰⁰ BM paras. 609-614; QM para. 11.37.

⁶⁰¹ BM paras. 610 and 650; QM paras. 11.41, 12.13, 12.16.

471. There is, thus, no disagreement between the Parties as to the character or the substance of the law governing the delimitation which they have asked the Court to effect.

SECTION 5.5 The impact of the supervening factor created by the extension of the Parties' respective territorial seas to 12 nautical miles

472. Qatar insists that a "new situation", a "new legal situation", has been created by the extension of the Parties' respective territorial seas from 3 to 12 nautical miles in 1992 and 1993.⁶⁰² On 8 July 1991, when the present proceedings were initiated, each of the Parties possessed a territorial sea of 3 nautical miles, so that the two States' territorial seas did not overlap and, as a result, there was an area of high seas and continental shelf between their respective outermost limits. Qatar extended its territorial sea to 12 nautical miles in 1992, while Bahrain did the same in 1993. This, so Qatar emphasises, has created a new and significantly different situation. In addition, Qatar points out that the situation of Fasht ad Dibal and of Qit'at Jaradah has changed significantly. Formerly, each of these maritime features was situated outside the territorial sea of either Party. Qit'at Jaradah is now situated within the area of overlap of the Parties' respective territorial seas, while Fasht ad Dibal is situated partly within Qatar's territorial sea.⁶⁰³ It is "within the context of this situation", "in the light of that situation", according to Qatar, that the delimitation is to be effected.⁶⁰⁴

473. Bahrain rejects Qatar's basic assumptions that (i) the maritime delimitation should ignore the islands and other maritime features situated between the main island of Bahrain and Qatar, and (ii) Qatar has sovereignty over the Hawar Islands and

⁶⁰² QM paras. 11.3, 11.5-11.12.

⁶⁰³ QM paras. 11.10-11.11.

⁶⁰⁴ QM paras. 11.3 and 11.12.

Zubarah. That aside, the extension of the Parties' respective territorial seas from 3 to 12 nautical miles certainly cannot be overlooked. As will be seen later,⁶⁰⁵ prior to the extension of the Parties' respective territorial seas – accepting Qatar's basic assumptions for the purposes of argument – the respective territorial seas did not overlap. The relevant part of the British line of 1947 lay completely between the outer limits of the Parties' respective territorial seas, *i.e.*, not within the territorial sea of either, as did also the median line between the main island of Bahrain and the Qatari coast. Today, by contrast – still accepting Qatar's basic assumptions for the purposes of argument – both the 1947 line and the median line between the main island of Bahrain and the Qatari coast pass through the area of overlap of the Parties' territorial seas, *i.e.*, through Qatar's territorial sea as well as through what Qatar considers to be Bahrain's territorial sea.

SECTION 5.6 The British line of 1947 is not the maritime boundary

474. Qatar does not ask the Court to decide that the line defined in the letters written by the British Political Agent on 23 December 1947 "is to be automatically regarded as the boundary line." Qatar limits itself to asking the Court to define the boundary "with due regard to" this line.⁶⁰⁶ Bahrain is pleased to note Qatar's explicit recognition of the fact that the British 1947 line formed part of a historical context which is now superseded, and hence that the 1947 line cannot be considered to be the maritime boundary in the context of the contemporary law of maritime delimitation.

SECTION 5.7 The two major points of disagreement

475. It thus appears that the Parties concur on a number of significant points. On two major points, however, they manifestly disagree.

⁶⁰⁵ See *infra*, paras. 582 *et seq.*

⁶⁰⁶ QM paras. 11.19-11.20.

476. First, Qatar's maritime claim is founded upon the proposition that there is a physical and legal vacuum between the main island of Bahrain and the coast of Qatar – with the exception of the Hawar Islands, Fasht ad Dibal and Qit'at Jaradah, over all of which Qatar claims sovereignty. This postulate is both factually and legally erroneous. It is factually erroneous because the area between the two "mainland coasts" contains, not the nothingness which Qatar assumes, but numerous islands and other features whose existence cannot be negated by the stroke of a pen. Qatar's proposition is legally erroneous because it fails to recognise the essentially insular and archipelagic character of the State of Bahrain.

477. Secondly, while Qatar agrees with Bahrain that the 1947 line does not govern and is not the maritime boundary, Qatar still tries to slip the 1947 line in through the back door by asking that some legal effect be given to it as a special or relevant circumstance. Qatar goes so far as to maintain that it is only to the north of the point BLV (*i.e.*, beyond the northernmost limit of the 1947 line) that the Court is required to effect a *de novo* delimitation.⁶⁰⁷ To the south of this point (*i.e.*, where the 1947 line exists), Qatar alleges, "it cannot be said that the Court is faced with a purely *de novo* maritime delimitation."⁶⁰⁸ In Bahrain's view, the 1947 line is completely irrelevant in the context of contemporary international law and has no role to play in the delimitation of the single maritime boundary the Court is requested to effect.

478. Accordingly, Chapters 6 and 7 will refute:

- the proposition, basic to Qatar's entire argument, that the delimitation is to be effected on the basis of the fiction that a physical and legal vacuum lies between the main island of Bahrain and the coast of Qatar (with the

⁶⁰⁷ QM paras. 12.4-12.5.

⁶⁰⁸ QM para. 11.2.

exception of the Hawar Islands, Fasht ad Dibal and Qit'at Jaradah, over all of which Qatar unjustifiably claims sovereignty); and

- the weight which Qatar unjustifiably and inconsistently gives to the British 1947 line.

Finally, having examined critically the foundations upon which Qatar's claim is based, Bahrain proposes, in Chapter 8, to demonstrate that the maritime boundary which Qatar claims manifestly fails to comply with the requirements of contemporary international law.

CHAPTER 6

QATAR'S CLAIM RESTS ON THE FICTION OF A GEOGRAPHICAL AND LEGAL VACUUM BETWEEN THE COAST OF BAHRAIN'S MAIN ISLAND AND THE QATARI PENINSULA, DISREGARDING THE INSULAR AND ARCHIPELAGIC NATURE OF BAHRAIN

479. According to Qatar, the maritime delimitation must use as a starting point a median line "drawn by taking exclusively into consideration the two main opposite coasts, without regard to the numerous particular features existing in the area".⁶⁰⁹ Qatar subsequently reaffirms this proposition, stating that for the purpose of comparing the Parties' respective coastal lengths, "no account will be taken either of islands and islets or of low-tide elevations".⁶¹⁰ Later still, for the purposes of defining the imaginary line separating the southern and northern sectors and, hence, determining the starting point for the delimitation it claims in the northern sector, Qatar restates "the position ... always taken in the present Memorial, that no account should be taken of islands, islets, rocks and low-tide elevations in drawing the dividing line."⁶¹¹ Qatar's claim, then, is for a delimitation between the main island of Bahrain and the Qatari coast which does not take into account and completely ignores the presence of the numerous insular and other features lying between these two coasts.⁶¹²

⁶⁰⁹ QM para. 11.37.

⁶¹⁰ QM para. 12.31.

⁶¹¹ QM para. 12.63.

⁶¹² The only maritime features mentioned in Qatar's Memorial are the Hawar Islands, Fasht ad Dibal and Qit'at Jaradah. The Hawar Islands have been discussed in this Counter-Memorial at para. 473, *supra*. Fasht ad Dibal and Qit'at Jaradah will be discussed at paras. 502 *et seq.*, *infra*.

480. Qatar is well aware of the geographical reality, as is evidenced by the geographical description which appears at the beginning of Qatar's Memorial.⁶¹³ Qatar refers to Lorimer's well-known Gazetteer, whose volume II, published in 1908-1915, "described the group of islands that formed the sheikhdom of Bahrain as follows: '... taken all together these form a compact group almost in the middle of the gulf...'"⁶¹⁴ Lorimer's description was in fact more explicit than Qatar's brief citation leads one to believe:

"Extent and importance.- The present Shaikhdom of Bahrain consists of the archipelago formed by the Bahrain, Muharraq, Umm Na'asan, Sitrah and Nabi Salih islands and by a number of lesser islets and rocks which are enumerated in the articles upon the islands: taken all together these form a compact group almost in the middle of the gulf which divides the promontory of Qatar from the coast of Qatif and which, as it has no recognised name, may appropriately be styled the Gulf of Bahrain. Connected with the sovereignty of Bahrain, or possibly appertaining to the Shaikh as hereditary personal property, are certain ill-defined rights upon the mainland of Qatar, at present (1905) under discussion. Whatever the nature or extent of these rights our attention will be confined, in the present article, to the undisputed insular possessions of the Shaikh."

Lorimer refers to the "islands of the archipelago" and to the "Bahrain Islands", and describes the coasts "of Bahrain Island, as also of the other Islands of the group".⁶¹⁵ These references, and particularly the trouble taken by Lorimer to distinguish between the main island of Bahrain and the other islands of the group, show beyond any doubt that Lorimer was awake to the insular and archipelagic character of the group which, together with the Zubarah Region, formed the Emirate of Bahrain, and today constitutes the State of Bahrain.

⁶¹³ QM para. 2.10.

⁶¹⁴ *Ibid.* (Emphasis added in Qatar's Memorial.)

⁶¹⁵ Lorimer, Gazetteer. QM Ann. II.3, Vol. 3, p. 88.

481. More recently, this point of view was expressed in the Persian Gulf Pilot (1982-1994), to which Qatar's Memorial also refers:

"Al Bahrayn... or Bahrain is an island about 27 miles in length from North to South, with a breadth of about 8 miles for most of its length...; together with a number of small islands and islets lying close to its shores, they form the independent Sovereign State of Bahrain".⁶¹⁶

482. Qatar also states that the name "Bahrain" has been used to refer in some cases to the main island, formerly known as "Awal", and in other cases to the three principal islands (Bahrain, Muharraq and Sitrah).⁶¹⁷ In reality, as the above-cited passages from Lorimer and from the Persian Gulf Pilot demonstrate, the name "Bahrain" is employed to refer to the group or archipelago which (together with the Zubarah Region) constitutes the State of Bahrain.

483. These references to the Gazetteer and to the Pilot⁶¹⁸ show clearly that the drafters of Qatar's Memorial are well aware of the special character of the State of Bahrain as an insular and archipelagic ensemble which cannot be reduced, by a play on the dual reference of the name "Bahrain", to one of its components. It is, therefore, all the more surprising that two pages later, when describing the maritime area to be delimited, Qatar's Memorial completely changes its approach. There is now no mention of a "group of islands" or of an "archipelago"; nor of any distinction between the use of the name "Bahrain" to refer to the entire State and its use to refer to a component of the entire State. As if by magic, "Bahrain" no longer refers to the multi-island State of

⁶¹⁶ Persian Gulf Pilot, published by The Hydrographer of the Navy, Twelfth Edition, 1982 as corrected to 24 September 1994 by Supplement No. 6-1994. QM Ann. II.1, Vol. 3, p. 37.

⁶¹⁷ QM para. 2.10.

⁶¹⁸ Elsewhere in its Memorial (QM para. 11.37), Qatar refers to a report of 1948 by Boggs and Kennedy in which these eminent geographers propose seabed boundaries for the Arabian Gulf which take into account only the technical aspects of the problem (QM Ann. IV.127, Vol. 10, pp. 123-154). They characterise "Bahrain as a political entity (which includes, in addition to Bahrain Island, the Hawar Islands, Muharraq Island, and numerous islets, reefs and shoal areas)." (p. 133)

Bahrain. Now it refers only to its main island. Qatar's play on words mistakes the part for the whole, rather as if, in the course of determining the boundaries of the state of New York, one were to refer only to the boundaries of the city of New York on the ground that the two entities share a common name. When Qatar defines the area to be delimited as the area "between the east coast of Bahrain and the west coast of Qatar", or "between the coasts of Qatar and Bahrain",⁶¹⁹ the contrived ambiguity leaps at the reader. This superficially nominalist approach echoes the approach taken in Qatar's Memorial to the territorial issues in dispute.

484. As to the other legally relevant components of the archipelago, Qatar makes a systematic attempt to minimise them. Thus, for example, when describing the main geographic features in the relevant area, Qatar's Memorial states rather dismissively that there are some "small islets, rocks and sand-banks."⁶²⁰ It also refers to "islets", "rocks", "reefs", and "shoals".⁶²¹ Clearly, Qatar would like the Court to overlook the archipelago's numerous islands within the meaning of Article 121(1) of the 1982 Convention. Some (*e.g.*, Al Mu'tarid and Umm Jalid) are not even mentioned. Others (*e.g.*, Halat Noon and Mashtan) are referred to by the pejorative term "islets" – a term devoid of legal meaning, since an island is an island in international law regardless of its size. Qatar attempts to minimise the significance not only of islands, but also of low-tide elevations, which also enjoy an important legal status in contemporary customary international law. Thalib (Tighaylib) and Fasht Al 'Azm are described as "reefs", whereas they are in fact low-tide elevations. Jabbari is referred to as a "rock", whereas it is in fact an island. Other low-tide elevations, such as Fasht Bu Thur and Qita'a el Erge, are simply ignored.

⁶¹⁹ QM paras. 9.2 and 9.8.

⁶²⁰ QM para. 10.17.

⁶²¹ QM para. 9.9.

485. Having ignored, minimised, or reduced to factual insignificance the numerous features lying between the main island of Bahrain and Qatar, Qatar proceeds to deny them any legal relevance whatever by proposing to effect the delimitation as if they did not exist. The unstated assumption is that the purpose of the delimitation is to determine the boundary, not between the State of Bahrain and the State of Qatar, but between the largest island of the State of Bahrain and the State of Qatar. Qatar assumes, in other words, that the State of Bahrain may be treated as if it were no more than its main island.

486. Qatar's calculated obliviousness to the political and geographical realities requires it to fabricate a justification. Qatar's purported justification is to be found in a few lines of paragraph 11.37 of Qatar's Memorial:

"... a provisional median line has to be drawn by taking exclusively into consideration the two main opposite coasts, without regard to the numerous particular features existing in the area, because most of those features do not qualify as islands generating their own maritime zone. Those features can be regarded as 'unusual features' which are to be neglected or disregarded for delimitation purposes."

Qatar goes on to claim that this method is consistent with State practice in the Gulf region, citing the Bahrain/Saudi Arabia Delimitation Agreement of 1958 and the Iran/Qatar Delimitation Agreement of 1969.

487. Few words need be wasted on Qatar's attempt to justify its method by reference to alleged State practice in the Gulf region. The agreements which Qatar cites date from a period when neither the concepts of islands and low-tide elevations nor their legal regime had been defined with precision in customary international law. The development of the modern law of maritime delimitation had scarcely begun. Moreover, the widely different solutions adopted by States in the context of freely negotiated agreements do not necessarily reflect legal principles. As the Court has stated on many occasions, while there is no legal limit to the considerations which States may take into account when negotiating delimitation agreements, only certain

considerations may be taken into account when a tribunal is called upon to effect a delimitation on the basis of law.⁶²² Indeed, the Court has held that the fact that a State has adopted a given method of delimitation *vis-à-vis* another State by agreement may not be invoked against that State in the context of another delimitation.⁶²³ Consequently, the fact that islands or low-tide elevations may or may not have been taken into account in one or another of the delimitation agreements concluded between coastal States of the Gulf cannot determine the rules governing the present delimitation. This is all the more so because the present case has characteristics which distinguish it from all the other delimitation agreements concluded between Gulf States.^{*} The present delimitation is not a continental shelf delimitation but a delimitation of a single maritime boundary. The contemporary law of maritime delimitation, which the Parties agree applies here, has evolved considerably in the course of recent years. Most important, the present case is not one where somewhat insignificant features situated near the mainland coastline of one of the Parties could displace what would otherwise be an equitable boundary, but one concerning islands and other features which, together with the Zubarah Region, constitute integral parts of the insular and archipelagic State of Bahrain.

488. The other considerations which Qatar sets out in this most important passage at paragraph 11.37 of its Memorial merit a more detailed examination. Bahrain will demonstrate (a) that the concept of "main coasts" has been expressly rejected by international jurisprudence; (b) that Qatar's theory of "features which do not qualify as

⁶²² See North Sea Continental Shelf, I.C.J. Reports 1969, p. 50, para. 93; Continental Shelf (Libya/Malta), I.C.J. Reports 1985, p. 40, para. 48; Delimitation of the Maritime Boundary in the Area between Greenland and Jan Mayen, I.C.J. Reports 1993, p. 63, para. 57. In relation to the extreme diversity of the solutions adopted by agreement among States, see D.W. Bowett, "Islands, Rocks, Reefs and Low Tide Elevations in Maritime Delimitation", in J.I. Charney and L.M. Alexander (eds.), International Maritime Boundaries, Martinus Nijhoff, (1993), Vol. I, pp. 131 *et seq.*

⁶²³ Delimitation of the Maritime Boundary in the Area between Greenland and Jan Mayen, I.C.J. Reports 1993, pp. 76-77, paras. 85-86.

islands generating their own maritime zone" does not take account of contemporary international law; and (c) that Qatar's appeal to the theory of "particular or unusual features" is based upon a complete misconception of this theory.

SECTION 6.1 The erroneous theory of so-called "main coasts"

A. There is no hierarchy between the coasts

489. Qatar asks that the Court effect a maritime delimitation between the two main opposite coasts, like the British line of 1947, *i.e.*, between the eastern coast of the main island of Bahrain and the western coast of Qatar.⁶²⁴

490. This is not the first occasion on which a State party to a maritime delimitation dispute has attempted to distinguish between that part of the other party's coast which it considers "primary" and that part which it considers "secondary". In the Gulf of Maine case, a Chamber of the Court rejected "an argument ignoring even the existence of real coasts, and disregarding them on account of their allegedly 'secondary' character."⁶²⁵ The Chamber observed that "the very legitimacy of such a distinction ... is very dubious" and that it would be unacceptable to attribute, "for the purposes of delimitation", "greater importance" to so-called primary coasts than to so-called secondary coasts:

"... geographical facts are not in themselves either primary or secondary: the distinction in question is the expression, not of any inherent property of the facts of nature, but of a human value judgment, which will necessarily be subjective.... [T]he facts of geography are not the product of human action amenable to positive or negative judgment, but the result of natural phenomena, so that they can only be taken as they are."⁶²⁶

⁶²⁴ QM Chapter X, Section 2.C.1.

⁶²⁵ Delimitation of the Maritime Boundary in the Gulf of Maine Area, I.C.J Reports 1984, p. 320, para. 177.

⁶²⁶ *Op. cit.*, p. 271, para. 36-37.

All the coasts of Bahrain's islands and other legally relevant maritime features are "real coasts". There is neither legal authority nor factual basis for demoting them to "secondary" rank in comparison with the coasts of the main island of Bahrain. There are, in fact, no "main coasts" of Bahrain and of Qatar; there are only "coasts", all of which are of equal value.

491. It may be added that in international law "the coast" is a term of art, which may be the low-water line of the terra *firma* or, in certain configurations, of reefs or low-tide elevations, or, in other configurations, straight baselines. Where baselines are properly drawn, they are the coast. This is why international law ascribes such importance to basepoints and baselines.

492. International law recognises the full range of maritime rights to all insular territories – not only to island States, but also to islands subject to the sovereignty of a State, whether that State is insular or continental. Under the rule of customary international law codified in Article 121 of the 1982 Convention, an island, *i.e.*, "a naturally formed area of land, surrounded by water, which is above water at high tide", is entitled to a territorial sea, a contiguous zone, an exclusive economic zone and a continental shelf "in accordance with the provisions applicable to other land territory." These rights exist whatever the size or socio-economic status of the island, and even if it is uninhabited or unfit for human habitation. Under Article 121(3) of the 1982 Convention (whose scope and customary status are uncertain), only "rocks which cannot sustain human habitation or economic life of their own" receive a reduced entitlement; such rocks are not entitled to an exclusive economic zone, nor to a continental shelf.

493. The contemporary law of the sea, as expressed in the relevant provisions of the 1982 Convention, holds that certain maritime features other than islands may constitute an integral part of the coastline and hence give rise to maritime entitlements. In certain circumstances which will be further discussed below, low-tide elevations are legally a

part of the coastline of the State to whose sovereignty they are subject and hence give rise to maritime entitlements.⁶²⁷

494. Finally, the respect due to geographical reality must not be forgotten. Jurisprudence has repeatedly proclaimed that delimitations must not attempt to refashion nature, nor to remodel geographical reality.⁶²⁸ Nature and geographical reality are as they are, and "the Court does not consider that markedly pronounced configurations can be ignored".⁶²⁹

B. Bahrain is a sea-oriented archipelagic State

495. By excluding the territories other than the main island of the archipelagic group of which the State of Bahrain is comprised, Qatar misrepresents geographical and, even more important, political and economic reality. The State of Bahrain does not consist of a continental or quasi-continental "mainland" – the main island – with offlying islets, rocks and low-tide elevations. The State of Bahrain consists of a system of inter-related maritime features, which includes, in addition to the main island of Bahrain and the islands of Muharraq and Sitrah, the Hawar archipelago and all the islands and other features scattered throughout the sea between the main island of Bahrain and the Qatar peninsula,⁶³⁰ together with the Zubarah Region. The islands and other maritime features are not accessories to or dependencies of the main island; they, together with the main island, form ("all together", to quote Lorimer) the State of Bahrain. They are the State of Bahrain; together they represent the State of Bahrain. If the old usage had continued whereby the main island still bore a name distinct from that of the ensemble, such as Al-

⁶²⁷ See *infra*, paras. 521 *et seq.*

⁶²⁸ North Sea Continental Shelf, I.C.J Reports 1969, pp. 49-50, para. 91; Continental Shelf (Libya/Malta), I.C.J Reports 1985, pp. 39-40, para. 46.

⁶²⁹ *Op. cit.*, p. 51, para. 96.

⁶³⁰ BM paras. 606 *et seq.*

Awal, this obvious point would not require clarification. Nominal usage does not alter reality.

496. Qatar is a continental land-oriented State; Bahrain, on the other hand, is a maritime sea-oriented State. Bahrain has marshalled in its Memorial evidence demonstrating that it always was considered to be essentially an archipelago and that the geographical, economic and social data demonstrate the inextricable relationship between the islands *inter se*, the Zubarah Region and the sea.⁶³¹ To use an expression employed by the Court, "[s]uch are the realities which must be borne in mind."⁶³² These realities require that all the constituent parts of the State of Bahrain – and not only its main island – be taken into account as an inseparable whole. Leaving these realities out of account would not be, as Qatar argues, a simplification. It would be a distortion and reinvention of reality to suit Qatar's own predetermined objectives, and an amputation of Bahrain. Just as it would have been illegitimate to ignore, under the guise of "simplification", the special character of the Norwegian *skjaergaard* in the Fisheries case, or the "bouclier" (shield) constituted by the Bijagos Islands in the Guinea/Guinea-Bissau case, or to ignore all of the maritime features constituting Indonesia except for Java and Sumatra, so it would be illegitimate in the present case to effect, for the ostensibly innocent purpose of "simplification", a maritime delimitation pretending that the State of Bahrain consists only of its main island.

497. As the Court has stated in a different but cognate context, one should not overlook the consideration of "certain economic interests peculiar to a region, the reality and importance of which are clearly evidenced by a long usage".⁶³³ In particular, Bahrain has drawn the attention of the Court to its fishing interests in the region.⁶³⁴ It

⁶³¹ BM paras. 568-605.

⁶³² Fisheries, I.C.J Reports 1951, p. 128.

⁶³³ Fisheries, I.C.J.Reports 1951, p. 133.

⁶³⁴ BM paras. 594-597.

would be unnecessary to refer to these again if Qatar's Memorial had not asserted that the question of fishing activities is irrelevant.⁶³⁵ In support of this contention, Qatar invokes two arguments, one factual, the other legal.

498. Qatar's factual argument is to the effect that fishing:

"was traditionally exercised by all communities in the Gulf, with no exclusive rights.... At present, the respective catches of Qatar and Bahrain are roughly equivalent. Fishing is thus of equal importance to the economies of both States...."⁶³⁶

This statement is both imprecise and misleading. Unlike Bahrain's Memorial which contains detailed information concerning fishing activity carried out by Bahrain,⁶³⁷ Qatar's Memorial offers no detailed information in support of its assertion that the respective catches of Bahrain and Qatar are "roughly equivalent." In addition, to infer from the proposition that the respective catches of Bahrain and Qatar are "roughly equivalent" that fishing "is thus of equal importance to the economies of both States" assumes that the other economic activities of the respective States are approximately equal. In fact, as Bahrain's Memorial notes,⁶³⁸ Bahrain's economy has nothing to compare with Qatar's high daily oil production or its vast liquefied natural gas projects.

499. The most serious inaccuracy in Qatar's statement is its failure to refer to the geographical location of the maritime areas where Bahrain's and Qatar's respective fishing activities are carried out. As Bahrain's Memorial makes clear,⁶³⁹ Bahrain's fishing activity is carried out almost exclusively in the maritime area lying between Bahrain's main island and Qatar, and much of this activity takes place within the

⁶³⁵ QM para. 9.15.

⁶³⁶ QM para. 9.16.

⁶³⁷ BM paras. 594-597.

⁶³⁸ BM paras. 55-57, 69-71.

⁶³⁹ BM paras. 594-597.

maritime areas in dispute between the two countries. By contrast, little of Qatar's fishing activity, so far as Bahrain is aware, takes place within any of the maritime areas which Bahrain claims. Qatar's fishing activity takes place principally in the waters lying off Qatar's eastern coast, where more than 90 % of Qatar's population lives, and is therefore irrelevant to the present dispute.

500. Qatar's legal argument is to the effect that "there do not appear to be any reasons based on fishing activities for modifying the course of the single maritime boundary which might otherwise be determined by the Court to produce an equitable result."⁶⁴⁰ Qatar here completely misapprehends Bahrain's submission. Bahrain does not present data relative to its fishing activities as a special circumstance necessitating an adjustment of the initial equidistance line. To the contrary, the fishing-related data presented by Bahrain, which demonstrate once again the links between Bahrain and the sea, serve to confirm the equitable character and the ineluctability of the median line in this case.

501. Bahrain's Memorial also demonstrates that:

"insofar as [the features lying to the east of Bahrain's main island] lend themselves to a certain form of human activity, it is only from Bahrain and by the inhabitants of Bahrain that such activity has ever been performed."⁶⁴¹

Nothing in Qatar's Memorial contradicts this demonstration.

502. This is particularly true of Fasht ad Dibal and Qit'at Jaradah. As Bahrain has pointed out in its Memorial,⁶⁴² Bahrain has conducted surveys and granted oil concessions over both of these features, and has constructed a cairn and an artesian well

⁶⁴⁰ QM para. 9.16.

⁶⁴¹ BM para. 603.

⁶⁴² BM paras. 576-587.

upon each of them. In relation to Fasht ad Dibal, Bahrain has granted licences in respect of permanent fish traps. Bahrain has regularly concerned itself with navigational difficulties in relation to Fasht ad Dibal; Bahrain's Memorial notes instances of maritime emergencies to which Bahrain reacted by sending assistance, as well as the interest which the Bahraini authorities demonstrated in resolving navigational difficulties on a long-term basis.

503. These acts of jurisdiction led the British Political Agent to conclude that Fasht ad Dibal and Qit'at Jaradah should be considered as Bahraini territory. In a letter dated 31 December 1946 to the British Political Resident, the British Political Agent noted:

"... The Bahrain Government erected a cairn, numbered it and registered the shoal in their land records.

The Oil Company which holds the oil concession over Bahrain sunk, through a contractor, an artesian well on Deebal, and there is also a well on Jaradeh....

... Possibly Bahrain line-carrying boats use them more frequently than those of Qatar, and certainly Bahrain fishermen do visit the fashts."⁶⁴³

The British Political Agent went on to observe:

"With regard to the fashts being unknown until 1929, Lorimer mentions that in 1878 'a fleet of three Bahrain craft despatched by the Shaikh to patrol towards the Fasht-al-Deebal proceeded instead to Ras Rakan'. This shows that the shoal has been known to Bahrain for over 50 years. Surely it must have been known to mariners for a thousand years past."⁶⁴⁴

The British Political Agent concluded:

⁶⁴³ Letter from British Political Agent to British Political Resident, 31 December 1946. QM Ann. IV.92, Vol. 9, p. 446.

⁶⁴⁴ Letter from British Political Agent to British Political Resident, 31 December 1946. QM Ann. IV.92, Vol. 9, p. 442.

"My view then, based on the claims submitted and taking into account local opinion, is that the fashts Deebal and Jaradeh should be considered as Bahrain territory...."⁶⁴⁵

504. As Bahrain has noted in its Memorial,⁶⁴⁶ the British Political Resident's detailed report to the India Office dated 18 January 1947 unequivocally supported the conclusion that Bahrain had successfully established its sovereignty over Fasht ad Dibal and Qit'at Jaradah.

505. A letter dated 10 November 1947 from the Secretary of State for Commonwealth Relations to the British Political Resident (cited by Qatar in its Memorial) shows that the British Government agreed with this conclusion:

"(b) Fasht ad Dibal and Jaradeh shoals. Since the Sheikh of Bahrein has taken steps usually regarded as sufficient for an assertion of sovereignty, it is considered that these shoals must be allotted to him."⁶⁴⁷

506. The recognition of the inextricability of all of the components of the insular and archipelagic ensemble which is the State of Bahrain – and not just Bahrain's main island – is a geographical, political and legal necessity. To use, once again, an expression employed by the Court, "[t]his solution is dictated by geographic realities."⁶⁴⁸ In the instant case, this solution is dictated not only by geographic realities, but also by political realities and by the legal principles upon which the law of the sea is based.

⁶⁴⁵ Letter from British Political Agent to British Political Resident, 31 December 1946. QM Ann. IV.92, Vol. 9, p. 447.

⁶⁴⁶ BM para. 586.

⁶⁴⁷ QM para. 10.47. Express letter from Secretary of State for Commonwealth Relations to British Political Resident, 16 November 1947. QM Ann. IV.108, Vol. 10, pp. 37-39.

⁶⁴⁸ Fisheries, I.C.J. Reports 1951, p. 128.

SECTION 6.2 Qatar's equivocal reference to "features which do not generate their own maritime zone"

507. To support its fundamental thesis that all of Bahrain's coasts other than that of its main island should be ignored, Qatar also argues that most of the maritime features situated between the east coast of Bahrain's main island and the west coast of Qatar "do not qualify as islands generating their own maritime zone".⁶⁴⁹ This assertion, which is neither substantiated nor developed in Qatar's Memorial, is unfounded.

A. Bahrain's islands

508. Qatar does not dispute that, under contemporary international law, an island, according to the definition of Article 121(1) of the 1982 Convention, is "a naturally formed area of land, surrounded by water, which is above water at high tide". Nor does Qatar dispute that such an island, be it large or small, inhabited, uninhabited, or even uninhabitable, entitles the State to whose sovereignty it is subject to the same maritime jurisdiction, according to the same rules, as does any other land territory. The rule set out in Article 121(2), according to which islands are in this respect to be treated exactly as other land territory, is today firmly established. Controversies over the territorial sea entitlement of an uninhabited or uninhabitable island are a legacy of the past. Thus, it is difficult to understand what advantage Qatar hopes to gain from its attempt to reduce certain islands in the region to "islets" or "rocks", given that these terms have no legal significance or relevance to an island's territorial sea entitlement.

509. In stating that "most of the features" lying between the east coast of the main island of Bahrain and the west coast of Qatar do not qualify as islands generating their own territorial sea, Qatar must recognise *ipso facto* that some of these features do so qualify. Given that Qatar does not dispute that these islands form part of the State of

⁶⁴⁹ QM para. 11.37.

Bahrain, Qatar's basic assumption, that the delimitation between Bahrain's and Qatar's respective maritime zones should be based exclusively on the coastlines of Bahrain's main island and of the Qatar peninsula, simply cannot be sustained. The well-known formula that the land dominates the sea means that all land territory, continental or insular (except, of course, land-locked territory), gives rise to maritime entitlements. By claiming a mainland-to-mainland delimitation while at the same time accepting, as it must, that every island gives rise to maritime entitlements and that there are islands, which are subject to Bahrain's sovereignty, between Bahrain's main island and Qatar, Qatar locks itself into a self-contradiction.

510. There is no possible doubt of the island status of certain of Bahrain's maritime features within the meaning of Article 121. As Bahrain's Memorial states, in addition to the main Bahrain island and the islands of Sitrah and Al Muharraq, the Hawar Islands, Rabad al Gharbiyah, Rabad ash Sharkiyah, Al Mu'tarid, Jazirat Mashtan, and Umm Jalid qualify as islands under international law. Qatar's argument, therefore, is untenable with regard to these maritime features.

511. Concerning Qit'at Jaradah, Qatar asserts that it is a low-tide elevation, despite the fact that it acknowledges that parts are dry at high tide, a geographical fact that makes it an island.⁶⁵⁰ Bahrain's Memorial has shown that factually and legally Qit'at Jaradah qualifies as an island under international law.⁶⁵¹

512. Part B of Appendix 5 of Qatar's Memorial,⁶⁵² in which Qatar purports to "present in chronological order information gathered concerning ... Qit'at Jaradah", in fact supports Bahrain's view. Qatar cites, for example, a communication dated 26 March

⁶⁵⁰ QM para. 10.55 and Appendix 5, Vol. 15, pp. 125-143.

⁶⁵¹ BM paras. 622-624.

⁶⁵² QM Appendix 5, Vol. 15, pp. 135-141.

1940 from the British Political Agent to the British Political Resident, in which the former states that

"my information ... is that a small part of both these reefs remains exposed at all states of the tide."⁶⁵³

513. Again, Qatar cites a report dated 20 March 1956 from the British Political Resident to the Foreign Office, in which the British Political Resident states:

"Arrangements were therefore made to revisit the shoal at high water springs on February 28, 1956, and at this time ... an area of about a hundred square yards of sand by the beacon was dry to a height of two feet above the water level. The tidal height at the time of the visit is unlikely ever to be exceeded by more than half a foot, so that it would appear that this part of the shoal is permanently uncovered at all states of the tide in present circumstances."⁶⁵⁴

514. Qatar also cites a minute dated 21 April 1956 from Ewart-Biggs of the Eastern Department, Foreign Office:

"(ii) *Qit'at Jaradah* in its present state seems to have an area of sand permanently uncovered...."⁶⁵⁵

515. The report by the Commander of H.M.S. Loch Fada dated 14 April 1959, based on a visit to Qit'at Jaradah which took place on the evening of 9 April 1959, lends even more support to the proposition that Qit'at Jaradah was an island from the 1950s until 1986, when Qatar carried out an armed attack on Fasht ad Dibal and Qatari bulldozers removed that part of Qit'at Jaradah which was exposed at high tide.⁶⁵⁶

"At high water a pear-shaped island ninety yards long and fifty broad remained above water. The axis of the 'pear' lay north east to south west, the narrower portion being to the north east. The height of the island was between 2 feet and 2 feet 3 inches and it was evident that it had not been

⁶⁵³ QM Appendix 5, Vol. 15, p. 136.

⁶⁵⁴ QM Appendix 5, Vol. 15, p. 139.

⁶⁵⁵ *Ibid.*

⁶⁵⁶ QM Appendix 5, Vol. 15, p. 140.

covered by water for some time. The highest ridge has a hard crust about a quarter of an inch thick which is thought to be caused by the combined action of the sun and the feet of the many cormorants that roost there."

516. Finally, Qatar cites a letter dated 20 August 1959 from the British Political Resident to Walmsley of the Arabian Department of the Foreign Office, reporting that the Navy had indicated as follows:

"(a) Prognosis of future of Jaradeh:

'Although it is never possible to forecast accurately the changing effect of wind, tide and current it is considered that as Jaradeh was found to be a 2 ft. high island in February, 1956 and when visited in April, 1959 was again found to be of approximately the same height, it is probable that it will remain an island....'"

517. Bahrain notes in passing that Appendix 5 of Qatar's Memorial, in which Qatar purports to "present in chronological order information gathered concerning Fasht ad Dibal and Qit'at Jaradah, including marine surveys, sailing directions (Persian Gulf Pilot), some relevant charts and other official documents",⁶⁵⁷ fails to cite a letter written by Sir Charles Belgrave to the British Political Agent on 14 August 1937 in which Qit'at Jaradah is clearly referred to as "an island".⁶⁵⁸

518. In answer to these numerous pieces of evidence demonstrating that Qit'at Jaradah remained an island throughout the 1950s, Qatar's only resource (other than citations from the Persian Gulf Pilot which do not purport to be based upon recent surveys) is to state that

"In spite of all these reports, Kennedy, of the Admiralty, was not quite sure of the permanency of the islet on Qit'at Jaradah and envisaged that it might turn back into a low-tide elevation (letter dated 25 August 1959 to Walmsley, of the Foreign Office)."⁶⁵⁹

⁶⁵⁷ QM Appendix 5, Vol. 15, p. 127.

⁶⁵⁸ This letter is cited at BM para. 581.

⁶⁵⁹ See Letter from R. Kennedy, Hydrographic Department, Admiralty to A.R. Walmsley, Foreign Office, 25 August 1959. QM Ann. IV.223, Vol. 11, p. 301.

Qatar thus explicitly admits that Qit'at Jaradah was an island by the end of the 1950s; Qatar's argument for ignoring this reality is that one British official, in spite of what Qatar admits to be a significant number of pieces of evidence, was "not quite sure" that Qit'at Jaradah would remain an island, and envisaged "that it might turn back into a low-tide elevation." The hollowness of this argument is self-evident and requires no further comment.

519. Paragraph 22 of Part B of Appendix 5 of Qatar's Memorial⁶⁶⁰ contains the misleading statement that in 1986 "[m]ilitary intervention by the Qatari forces restored the *status quo*." The truth is that, as Bahrain has already pointed out in its Memorial⁶⁶¹ and in this Counter-Memorial,⁶⁶² Qatari bulldozers removed that part of Qit'at Jaradah which was exposed at high tide.

520. Even Qatar's own conclusion, following its review of citations which it purportedly produces in support of its contention that Qit'at Jaradah is not an island, is confused and hesitant. Qatar states:⁶⁶³

"in spite of some hesitation from 1940 onwards, it appears that Qit'at Jaradah is ... partly a sand bank which may not be dry at all states of the tide along its southern edge.... The conclusion is that Qit'at Jaradah is a low tide elevation in its natural form."

In the light of the many authorities which Qatar itself cites, and which support Bahrain's contention that Qit'at Jaradah had become an island by the 1950s and remained so until Qatar's armed intervention in 1986, this "conclusion" must be dismissed as unsupported and self-serving.

⁶⁶⁰ QM Appendix 5, Vol. 15, p. 141.

⁶⁶¹ BM para. 623.

⁶⁶² Para. 515, *supra*.

⁶⁶³ QM Appendix 5, Vol. 15, p. 141.

B. Bahrain's low-tide elevations

521. By asserting that most of the maritime features situated between the main island of Bahrain and Qatar do not qualify as islands generating their own maritime entitlement, Qatar seems to imply that only islands generate a maritime entitlement, while low-tide elevations do not. Since several of the maritime features situated between the eastern coast of the main island of Bahrain and Qatar's peninsula are low-tide elevations, this point merits attention.

522. Without retracing in detail the complex evolution of the concept of low-tide elevation and its legal regime, it will suffice to recall that both concept and regime have taken an extended time to become settled. The judgment of the Court in the Fisheries case shows how uncertain these matters still were even in the 1950s. The Court referred there to the case of a "low-tide elevation (drying rock)" (in the French version of the judgment: "en cas d'une élévation qui ne découvre qu'à marée basse (d'une sèche)"), without adopting a position on whether, and in what circumstances, such a feature might be taken into account as a basepoint for measuring the breadth of the territorial sea.⁶⁶⁴ The first reports of the International Law Commission reveal significant terminological and conceptual variations, both in English and in French. In English, there are references to "drying rocks", "shoals", "rocks awash"; in French, to "sèches", "fonds affleurants", "fonds couvrants et découvrants". These different terms were not always precisely defined. The terminology accepted today – "low-tide elevations", "hauts-fonds découvrants" – was first established at the Geneva Conference of 1958, when the concept was given a precise definition and legal regime in Article 11 of the Geneva Convention on the Territorial Sea and the Contiguous Zone; this provision is incorporated, in identical terms, in Article 13 of the 1982 Convention.

⁶⁶⁴ Fisheries, I.C.J. Reports 1951, p. 128.

523. Article 13 of the 1982 Convention defines a low-tide elevation as "a naturally formed area of land which is surrounded by and above water at low tide but submerged at high tide." The low-water line of a low-tide elevation may be used as the baseline for measuring the breadth of the territorial sea "[w]here a low-tide elevation is situated wholly or partly at a distance not exceeding the breadth of the territorial sea from the mainland or an island" (but not from another low-tide elevation, in order to prevent so-called leapfrogging). However, "[w]here a low-tide elevation is wholly situated at a distance exceeding the breadth of the territorial sea from the mainland or an island, it has no territorial sea of its own." In the case of straight baselines, Article 7(4) of the 1982 Convention provides that if the other conditions for the drawing of such baselines are satisfied, straight baselines may be drawn to and from low-tide elevations when lighthouses or similar installations which are permanently above sea level have been built on them or when the drawing of such baselines has received general international recognition.

524. The meaning of these rules – whose customary status is not denied by Qatar⁶⁶⁵ – is clear. By providing that a low-tide elevation wholly situated at a distance greater than the breadth of the territorial sea from the nearest mainland or island "has no territorial sea of its own", Article 13(2) implies that low-tide elevations situated wholly or partly at a distance not exceeding the breadth of the territorial sea from the mainland or an island do have their own territorial sea. Given "the close dependence of the territorial sea upon the land domain", and in the light of the principle that "[i]t is the land which confers upon the coastal State a right to the waters off its coasts",⁶⁶⁶ the fact that low-tide elevations may in some circumstances give rise to a territorial sea entitlement demonstrates that they form part of the territory of the State in question and that they are subject to its territorial sovereignty. Territorial sea can only exist if territorial

⁶⁶⁵ Qatar relies on Article 13 (1) with respect to Fasht ad Dibal and Qit'at Jaradah (QM para. 10.62).

⁶⁶⁶ Fisheries, I.C.J. Reports 1951, p. 133.

sovereignty exists to generate it. This brings to an end the old controversy as to whether low-tide elevations are capable of appropriation in sovereignty.⁶⁶⁷ It is accepted today that they are. Indeed, the Parties concur on this proposition, for Qatar itself requests the Court "to adjudge and declare ... that Fasht ad Dibal and Qit'at Jaradah shoals are low-tide elevations which are under Qatar's sovereignty."⁶⁶⁸ Since, other than the Hawar Islands, Fasht ad Dibal and Qit'at Jaradah, Qatar does not claim sovereignty over any of the maritime features situated between the eastern coast of Bahrain's main island and the western coast of Qatar, all of these maritime features, islands and low-tide elevations alike, must be deemed, by the common agreement of the two Parties, to be under Bahrain's sovereignty. As an integral part of Bahrain, they entitle Bahrain to maritime jurisdiction in accordance with the principles and rules of international customary law.

C. The law governing sovereignty over low-tide elevations is the law governing territorial sovereignty

525. With respect to the maritime entitlements of islands and other legally relevant maritime features, Qatar's Memorial puts forward a bizarre theory.⁶⁶⁹ Qatar's analysis relates specifically to Fasht ad Dibal and Qit'at Jaradah, the only two features (other than the Hawar Islands) situated between the main island of Bahrain and Qatar which Qatar claims. Given that Qatar regards Fasht ad Dibal and Qit'at Jaradah as low-tide elevations,⁶⁷⁰ Qatar's argument, if it were valid at all, would apply equally to the other low-tide elevations which form part of the State of Bahrain, and to which Qatar makes no claim.

⁶⁶⁷ See for example, Minquiers and Ecrehos, I.C.J. Reports 1953, p. 53, and Fitzmaurice, The Law and Procedure of the International Court of Justice, Grotius, (1986), Vol. I, pp. 287-288.

⁶⁶⁸ QM p. 307. See QM para. 10.73.

⁶⁶⁹ QM paras. 10.49 and 10.59 *et seq.*

⁶⁷⁰ QM paras. 10.54-10.55 and 10.58. The parties agree that Fasht ad Dibal is a low-tide elevation (See BM para. 626). As to Qit'at Jaradah, Bahrain has shown that it is an island within the meaning of Article 121 (see *supra*, paras. 511 *et seq.*).

526. Qatar's Memorial demonstrates Qatar's evident embarrassment at the fact that in 1947 the British authorities concluded that Fasht ad Dibal and Qit'at Jaradah, although situated to the east of the proposed continental shelf boundary, belonged to Bahrain because only Bahrain had exercised effective acts of sovereignty over them.⁶⁷¹ To escape this inconvenient fact, Qatar alleges that the British authorities made an error of law by applying the rules governing territorial sovereignty to these two features: "unlike islands, whose ownership is acquired by the usual methods of acquisition of land territory," so Qatar writes, "the acquisition of low-tide elevations ... is governed by application of the law of the sea.... [T]he reasoning of the British Government insofar as it was based on the analogy of land territory lacks conviction."⁶⁷² Qatar criticises what it calls "a mistaken analogy between low-tide elevations and land territory"⁶⁷³ and asserts that low-tide elevations are governed by the law of the sea alone.

527. In regard to the provisions of the 1982 Convention, whose customary status Qatar admits, Qatar then asserts:

- that a low-tide elevation situated within a State's territorial sea belongs to that State "as part of the bed of its territorial sea"⁶⁷⁴ since, under Article 2 of the 1982 Convention, the sovereignty of a State "extends to the air space over the territorial sea as well as to its bed and subsoil";
- that a low-tide elevation situated outside a State's territorial sea, but on its continental shelf, forms an integral part of the latter; Qatar says that

⁶⁷¹ Qatar cites in this regard a letter from British Political Resident Hay dated 18 January 1947 (QM para. 10.60) and a letter from the Secretary of State for the Commonwealth to the British Political Resident, 10 November 1947 (QM para. 10.47).

⁶⁷² QM para. 10.49.

⁶⁷³ QM para. 10.59. On the issue of the impermissibility of challenging the validity of an arbitral award on the basis of an alleged error of law, see *supra*, para. 387.

⁶⁷⁴ QM para. 10.62.

under Article 77 of the 1982 Convention the coastal State enjoys exclusive sovereign rights over such a low-tide elevation, so as to render it incapable of appropriation by a third State;⁶⁷⁵

- that a low-tide elevation situated on the high seas (*i.e.*, outside the exclusive economic zone and continental shelf of any State) is incapable of appropriation, by virtue of Article 89 of the 1982 Convention which provides that "No State may validly purport to subject any part of the high seas to its sovereignty."⁶⁷⁶

528. The theory put forward by Qatar amounts to treating low-tide elevations as a part of the seabed and subject to the same legal regime as the seabed. For Qatar, low-tide elevations are subject to the regime of the territorial sea (and hence capable of appropriation in sovereignty) if they are situated within the territorial sea of a coastal State; they are subject to the regime of the continental shelf (and hence liable only to appropriation of sovereign rights but not to appropriation in sovereignty proper) if they are situated outside the territorial sea but within the limits of the continental shelf; while they are subject to the regime of the high seas (and hence incapable of any appropriation) if they are situated on the high seas. Under this theory, low-tide elevations have no legal autonomy; although above water at low tide, they are to be treated exactly as if they were a part of the seabed; they can never constitute a territory over which sovereignty may be acquired and disposed of according to the principles and rules governing territorial sovereignty.

529. This theory, which is evidently propounded in an attempt to neutralise the legally decisive acts of sovereignty which Bahrain – and Bahrain alone – has exercised over Fasht ad Dibal and Qit'at Jaradah, is unambiguously condemned by the 1982

⁶⁷⁵ QM para. 10.64.

⁶⁷⁶ QM para. 10.63.

Convention which Qatar claims to invoke in its support. The 1982 Convention, far from treating low-tide elevations as a part of the seabed, expressly provides that a low-tide elevation may in certain circumstances generate its own territorial sea. If the 1982 Convention had not considered a low-tide elevation to constitute a territory, it could not have provided that a low-tide elevation may be used as a normal baseline if situated wholly or partly within the territorial sea of the relevant State. Nor could it have provided that, even if it does not satisfy this condition, a straight baseline may be drawn to or from a low-tide elevation if a lighthouse or similar installation permanently above water has been built on it, or if the drawing of such a straight baseline has received general international recognition. Qatar's theory, by making the rights of a State over a low-tide elevation depend upon its status as a part of the seabed, inverses the fundamental relationship between the land and sea: instead of the land dominating the sea, the sea would dominate the land.

530. Qatar's strange conception is first applied to Fasht ad Dibal and to Qit'at Jaradah in the situation of a territorial sea of 3 nautical miles, such as existed in 1991 when Qatar filed its Application. Qatar argues that these two features, which were then situated outside Qatar's three-mile territorial sea limits and hence were not subject to its sovereignty, were part of Qatar's continental shelf because they were situated to the east of the British seabed boundary line of 1947.

531. The untenability and absurdity of Qatar's theory (whereby low-tide elevations constitute an integral part of the seabed) becomes apparent when one examines its consequences having regard to the extension of each Party's territorial sea to 12 nautical miles.

532. As regards Fasht ad Dibal, Qatar recognises that, on the basis of a 12-mile territorial sea, only a part – and the smaller part at that – of this low-tide elevation is

situated within Qatar's territorial sea,⁶⁷⁷ as is shown by Map N° 14 of Qatar's Memorial (reproduced as Map 4 of this Counter-Memorial). According to Qatar's reasoning under which sovereignty over a low-tide elevation depends upon the seabed on which it is situated, one wonders what is to become of that part of Fasht ad Dibal which is situated outside Qatar's territorial sea. If, as Qatar claims, low-tide elevations are to be treated as part of the seabed, then that part of Fasht ad Dibal which is further than 12 miles from Qatar would be situated on both Qatar's and Bahrain's continental shelf (since it is less than 200 nautical miles from each of them). A problem of territorial sovereignty would therefore arise, whose resolution would depend upon the prior delimitation of the continental shelf. In other words, the delimitation of the continental shelf would precede the determination of territorial sovereignty. The sea would dominate the land. The legal reality is, of course, the opposite: the land dominates the sea. In order to delimit the two countries' continental shelves beyond their 12-mile territorial seas, it is necessary first to determine to which country Fasht ad Dibal belongs. Such a determination can only be made by applying the principles and rules governing the acquisition of territorial sovereignty. Only after the question of sovereignty over Fasht ad Dibal has been determined can one proceed to effect the maritime delimitation.

533. As to Qit'at Jaradah, Qatar's position appears even more untenable. With a 12-mile territorial sea, Qit'at Jaradah is currently situated in the territorial sea of both countries, *i.e.*, in the area where the respective territorial seas overlap. If sovereignty over a low-tide elevation – assuming *arguendo* that Qit'at Jaradah is a low-tide elevation, rather than an island as Bahrain has demonstrated that it is – depended upon its situation on the seabed, Qit'at Jaradah would be under the sovereignty of both Bahrain and Qatar pending authoritative establishment of the maritime delimitation. This demonstrates once more the necessity of proceeding from the land to the sea. Once again, only after determining the territorial sovereignty over Qit'at Jaradah in the light of

⁶⁷⁷ QM para. 10.69.

the principles and rules relating to sovereignty over territory can one proceed to the delimitation of the maritime boundary.

534. In an attempt to escape the absurd implications of its theory, Qatar suggests approaching the problem "from another perspective"⁶⁷⁸ – a euphemistic understatement for a complete change of approach. Abandoning the criterion which it had just proposed, Qatar notes that Fasht ad Dibal and Qit'at Jaradah are closer to Qatar than they are to "Bahrain" (which for Qatar means "the main island of Bahrain") and "Qatar now requests the Court to adjudge and declare that Dibal and Qit'at Jaradah are low-tide elevations which, by their very location, are under Qatar's sovereignty."⁶⁷⁹ (Emphasis added.)

535. As already seen, Qatar thus recognises that under contemporary international law, low-tide elevations are in certain circumstances capable of appropriation in sovereignty. According to the fundamental principles of the law of the sea, territorial sovereignty determines both the entitlement of the coastal State over the adjacent maritime areas, and the delimitation between the areas belonging to States with opposite or adjacent coasts. This implies that the delimitation of a single maritime boundary between Bahrain and Qatar which the Court has been requested to effect must necessarily begin with the determination of territorial sovereignty over the islands and other legally relevant maritime features which are situated in the area to be delimited. Only after thus determining the question of territorial sovereignty will the Court be in a position to delimit the maritime boundary.

⁶⁷⁸ QM paras. 10.69 and 10.72.

⁶⁷⁹ QM para. 10.73.

D. Bahrain's sovereignty over all the features lying between the eastern coast of Bahrain's main island and the western coast of the peninsula of Qatar

536. The first step, then, is to determine which of the two States exercises sovereignty over these maritime features. Qatar answers this question only with respect to the Hawar Islands and to Fasht ad Dibal and Qit'at Jaradah. The question of the Hawar Islands is discussed in Chapters 2 and 3 of this Counter-Memorial, and there is no need to return to it here. As to Fasht ad Dibal and Qit'at Jaradah, Qatar claims that these features are subject to Qatar's sovereignty "by their very location". Bahrain has demonstrated that (i) the theory whereby proximity and contiguity may serve as the basis of sovereignty in a situation of competing claims has been definitively rejected under international law⁶⁸⁰ and (ii) Fasht ad Dibal and Qit'at Jaradah are, by virtue of the principles and rules of international law governing sovereignty over territory, subject to the sovereignty of Bahrain.⁶⁸¹ As to the legally relevant maritime features other than Fasht ad Dibal and Qit'at Jaradah, Qatar does not claim sovereignty over them.

537. Bahrain's sovereignty over the entirety of the insular and other maritime features situated between the east coast of the main island of Bahrain and the west coast of Qatar – the Hawar Islands, Fasht ad Dibal, Qit'at Jaradah, and all the other maritime features – has a critical consequence for delimitation: the principles of the law of the sea will not countenance a maritime delimitation which treats these maritime features as if they did not exist, or, in other words, as if the only relevant coastlines were the coastlines of Qatar and of the main island of Bahrain. In Tunisia/Libya, the Court declined to effect the delimitation as if Jerba Island or the Kerkennah Islands and surrounding low-tide elevations did not exist.⁶⁸² The coast of each one of the maritime features situated

⁶⁸⁰ BM paras. 521 *et seq.* and 591.

⁶⁸¹ BM paras. 577-586, 597.

⁶⁸² Continental Shelf (Tunisia/Libya), I.C.J. Reports 1982, pp. 63-64, para. 79, and pp. 88-89.

between Bahrain's main island and Qatar – be it a small, uninhabited island or a low-tide elevation, provided only that it fulfils the requisite legal conditions – is just as relevant to the delimitation of the maritime boundary as are the coastlines of Bahrain's main island and of Qatar. Qatar claims that a delimitation ignoring these maritime features would be a "simplification". In fact, it would be an amputation. It would constitute a gross violation of the essentially insular and archipelagic character of the State of Bahrain and distort its geographical and political reality, and also would be inconsistent with the fundamental rules of the law of maritime delimitation.⁶⁸³

538. It should be unnecessary to remind the Court that, in requesting that the maritime delimitation take account of the fact that the maritime features situated between Bahrain's main island and Qatar form an integral part of the State of Bahrain, indeed, are the State of Bahrain, Bahrain does not claim to be entitled to the whole of the maritime areas between its main island and Qatar. As Bahrain's Memorial explicitly states,⁶⁸⁴ Bahrain asks only that the delimitation be effected between the coastline of Qatar, on one hand, and that of Bahrain as it factually and legally is (rather than as Qatar attempts to depict it), on the other. Qatar's image of "Bahrain ruling the waves"⁶⁸⁵ is pure fantasy.

SECTION 6.3 Qatar's misconceived recourse to the theory of "unusual features"

539. In support of its argument that the maritime delimitation should be effected as between the east coast of Bahrain's main island and the west coast of Qatar without

⁶⁸³ It is noteworthy that in 1947 the British authorities were quite hesitant in this regard. See, for example, the letter from the India Office to the Foreign Office dated 13 February 1947. QM Ann. IV.94, Vol. 9, p. 461-462 and the Minute dated 12 March 1947 by Beckett. QM Ann. IV.95, Vol. 9, p. 468.

⁶⁸⁴ BM para. 589.

⁶⁸⁵ QM para. 10.33.

taking into account the maritime features situated between them, Qatar's Memorial finally asserts that these maritime features "can be regarded as 'unusual features' which are to be neglected or disregarded for delimitation purposes."⁶⁸⁶ Bahrain presumes that Qatar here intends to refer to the jurisprudence according to which the process of delimitation, although it is not to refashion nature or rectify geography, should minimise, or even in some cases eliminate, the exaggerated effect which would otherwise be produced by certain minor geographical accidents.

540. It is scarcely necessary to recall that in the 1950s, in the course of the proceedings of the International Law Commission, it was suggested that "provision must be made for departures [from the equidistance rule] necessitated by any exceptional configuration of the coast, as well as the presence of islands or navigable channels."⁶⁸⁷ Different formulations of this exception were considered, before the Commission decided, in 1953, to adopt the expression "special circumstances". During the Geneva Conference, Commander Kennedy mentioned, as one of the special circumstances which could call for consideration in the course of delimitation, "the presence of a small or large island in the area to be apportioned". Commander Kennedy suggested that "islands should be treated on their merits" and that "very small islands or sand cays"⁶⁸⁸ should not be taken as starting points for delimitation. In a memorandum distributed by the British delegation at the 1958 Conference, Commander Kennedy stated: "It would seem most inequitable, for instance, if the existence of an island or islet (which by definition need only be a small above-water rock or sandbank, possibly

⁶⁸⁶ QM para. 11.37. As already noted (*supra*, paras. 507 *et seq.*), the inapplicability of this part of Qatar's argument is virtually acknowledged when Qatar states that "most of those features do not qualify as islands generating their own maritime zone." (Emphasis added.) Qatar's acknowledgement that islands are present in the area to be delimited exposes its argument for simplification as absurd.

⁶⁸⁷ Yearbook of the International Law Commission 1953, Vol. II, p. 216, and 1956, Vol. II, p. 300.

⁶⁸⁸ UNCLOS I, Official Records, Vol. VI, p. 93.

only a few yards long and a few feet high) should be allowed to divert a boundary and thus give extensive areas of shelf to the State possessing the island."⁶⁸⁹

541. In 1969, in the North Sea cases, the Agent of the Federal Republic of Germany presented to the Court a diagram showing that, as between adjacent coasts, even an insignificant projection of one of the coasts, or the presence of a tiny islet lying off one of the coasts, could bring about a disproportionate diversion of the equidistance line – a diversion, moreover, which would increase as one moved further from the coasts – in favour of the State enjoying the benefit of such an accident of nature, at the other State's expense. The Agent added that an equivalent effect could be produced as between opposite coasts, although in this case it would be described less as a "diversion effect" than as a "roll-back, push-off effect", in that the presence of the island would cause the equidistance line to be rolled back, or pushed off, towards the opposite coast.⁶⁹⁰ It was to avoid such an effect that the Court referred in its judgment to "abating the effects of an incidental special feature from which an unjustifiable difference of treatment could result"⁶⁹¹ and "ignoring the presence of islets, rocks and minor coastal projections, the disproportionately distorting effect of which can be eliminated by other means"⁶⁹² and decided that the delimitation should take into account "the presence of any special or unusual features".⁶⁹³

542. With variations in terminology, the subsequent jurisprudence confirmed and developed this approach, which consists of giving, for delimitation purposes, full effect,

⁶⁸⁹ Kennedy, "Brief Remarks on Median Lines and Lines of Equidistance and on the Methods Used in their Construction", A/CONF. 13/42, p. 93, in Northcott Ely, "Seabed Boundaries Between Coastal States: The Effect to be Given Islets as 'Special Circumstances'", International Lawyer, Vol. 6, 1972, pp. 219 *et seq.*, at p. 225.

⁶⁹⁰ North Sea Continental Shelf, I.C.J. Pleadings 1968, Vol. II, pp. 29-30.

⁶⁹¹ I.C.J Reports 1969, p. 50, para. 91.

⁶⁹² *Op. cit.*, p. 36, para. 57.

⁶⁹³ *Op. cit.*, p. 54, para. 101 D).

partial effect or no effect to a given island, islet, rock or low-tide elevation.⁶⁹⁴ The philosophy behind this jurisprudence is clear. Its object is to prevent a minor accident of geography from causing a disproportionate deviation of the equidistance line, which would be a source of inequity, while making compensatory adjustments elsewhere in the delimitation line.

543. The purpose of this jurisprudence is neither to correct geographical reality in order to render it more equitable nor "to create a situation of complete equity where nature and geography have established an inequity."⁶⁹⁵ The tribunals have, therefore, carefully avoided applying the theory in ways that would involve refashioning nature or rectifying geographical reality. In the Delimitation of the Maritime Boundary in the Gulf of Maine Area case, for instance, the Chamber of the Court, while applying the theory of particular features in certain cases,⁶⁹⁶ categorically rejected "the idea ... that certain geographical features are to be deemed aberrant by reference to the presumed dominant characteristics of an area, coast or even continent."⁶⁹⁷

544. The theory of particular or unusual features does not apply to the present case, because the delimitation here is not between two continental coasts between which islands and other off-lying features belonging to one or other of the parties happen to be situated. In that situation, various solutions have been adopted by States negotiating treaties among themselves and by tribunals resolving disputes, giving to each maritime feature, as the case may be, full effect, partial effect or no effect. The present delimitation, however, is a delimitation between the Qatar peninsula and the system of

⁶⁹⁴ See P. Weil, The Law of Maritime Delimitation – Reflections, Grotius, p. 89 and pp. 225 *et seq.* (1989).

⁶⁹⁵ Delimitation of the Continental Shelf between the United Kingdom and France, United Nations, Reports of International Arbitral Awards, Vol. XVIII, p.116, para. 249.

⁶⁹⁶ I.C.J Reports 1984, p. 330, para. 201; p. 336-337, para. 222.

⁶⁹⁷ *Op. cit.*, p. 271, para. 36.

546. To conclude, in whatever manner the problem is approached, Qatar's proposal of a delimitation which takes account of none of the islands or other legally relevant maritime features lying between the eastern coast of Bahrain's main island and the western coast of the Qatari peninsula is unacceptable.

CHAPTER 7

QATAR'S CLAIM GIVES UNDUE WEIGHT TO THE BRITISH LINE OF 1947

SECTION 7.1 Qatar's position

547. In its Application of 5 July 1991, Qatar requested the Court to delimit a single maritime boundary between the two countries "with due regard to the line dividing the sea-bed of the two States as described in the British decision of 23 December 1947." By "the British decision of 23 December 1947", Qatar means the two letters, in identical terms, which were sent on 23 December 1947 to the Rulers of Bahrain and Qatar respectively by C.J. Pelly, the then British Political Agent in Bahrain. These letters purported to:

"... forward herewith for Your Excellency's information a copy of a map showing the line ... which, His Majesty's Government considers, divides in accordance with equitable principles the sea-bed...."⁶⁹⁹

548. Qatar's position with respect to the 1947 line may be summarised as follows:

- (a) The 1947 line does not constitute *per se* a single maritime boundary which now delimits the two States' maritime areas:

"Qatar does not contend that the 1947 line is to be automatically regarded as the boundary line to be delimited between the maritime areas pertaining to Qatar and those pertaining to Bahrain.... Qatar ... is not claiming a single maritime boundary drawn 'along' that line...."⁷⁰⁰

⁶⁹⁹ The text of these letters is reproduced in QM Ann. II.52, Vol. 5, pp. 205 and 209 and QM Ann. IV.115 and 116, Vol. 10, pp. 71 and 75. The present whereabouts of the original map enclosed with Pelly's letters is unknown (see QM para. 3.80, note 107).

⁷⁰⁰ QM paras. 11.19-11.20. (Emphasis in original.)

(b) Qatar requests that the single maritime boundary be delimited "with due regard" to the 1947 line in the sense that "The Court, when drawing the single maritime boundary, cannot act as if that line had never existed." In other words, "the 1947 line, by the very fact that it was drawn as a continental shelf boundary between the two Parties, is a factor or circumstance highly relevant for the purpose of drawing a single maritime boundary."⁷⁰¹ Qatar asks the Court to consider the 1947 line:

- as a "special circumstance"⁷⁰² for the purposes of the territorial sea delimitation in the southern sector, under the customary rule set out in Article 15 of the 1982 Convention, according to which territorial sea delimitations should be effected by the equidistance method except where it is necessary by reason of "historic title or other special circumstances" to delimit the territorial sea of the two States in a way which is at variance therewith;
- as a "relevant circumstance" in that part of the northern sector where the 1947 line exists, *i.e.*, as far as the point BLV. Qatar refers here to a "relevant circumstance", since the delimitation in this sector is not a territorial sea delimitation, but a delimitation of maritime zones situated outside the territorial sea. The customary rule applicable to such delimitations is that delimitation should be effected according to equitable principles, taking into account relevant circumstances so as to arrive at an equitable solution.⁷⁰³

⁷⁰¹ QM para. 11.19.

⁷⁰² QM paras. 11.20, 11.39. Qatar also suggests, without however making a clear statement to this effect, that the 1947 letters could have created an "historic title" (QM para. 11.39). See *infra*, paras. 585 and 586.

⁷⁰³ QM paras. 11.41, 12.14. In the case of the Maritime Delimitation in the Area between Greenland and Jan Mayen, the Court noted "a tendency towards assimilation" between the

- (c) Qatar asks the Court: (i) to disregard the segment of the British 1947 line running from its southernmost point, the point M, to the point L, and to replace this segment by another boundary described in Qatar's Memorial;⁷⁰⁴ and (ii) to consider as a special or relevant circumstance the segment of the line running from the point L in the south to the point BLV in the north.⁷⁰⁵
- (d) As the British 1947 line does not extend north of the point BLV, Qatar asks the Court to effect a delimitation *de novo*⁷⁰⁶ to the north of this point. For this purpose, Qatar asks the Court to draw from the point BLV a line perpendicular to the line joining Ra's Rakan⁷⁰⁷ and Muharraq and passing through the point BLV. This perpendicular is then slightly rotated about the point BLV.

SECTION 7.2 Qatar's position is self-contradictory

549. Qatar's request is flagrantly self-contradictory in a number of respects. Qatar asserts that it "is not claiming a single maritime boundary drawn 'along' that line",⁷⁰⁸ and that the British 1947 line is not the present single maritime boundary, but merely "a circumstance highly relevant for the drawing of a single maritime boundary."⁷⁰⁹ On the other hand, Qatar candidly recognises that up to the turning point of BLV the boundary

"special circumstances" which "might modify the result produced by an unqualified application of the equidistance principle" and the "relevant circumstances" which "can be described as a fact necessary to be taken into account in the delimitation process" (*I.C.J. Reports 1993*, pp. 62-63, paras. 55-56). The parties agree on this point: see BM para. 650; QM para. 11.41.

⁷⁰⁴ QM paras. 11.27-11.33.

⁷⁰⁵ QM para. 11.34.

⁷⁰⁶ QM para. 12.5.

⁷⁰⁷ Not exactly the island of Ra's Rakan but rather the northernmost point of the Qatar peninsula (see QM para. 12.63, and *infra*, fn. 767). For convenience, this point is referred to hereafter as Ra's Rakan.

⁷⁰⁸ QM para. 11.20.

⁷⁰⁹ QM para. 11.19.

it claims "corresponds to the line laid down by the 1947 decision."⁷¹⁰ And in its Submissions at the end of its Memorial, Qatar explicitly "requests the Court ... to draw a single maritime boundary" south of the point BLV "following the line of the British decision of 23 December 1947 ... up to point L."⁷¹¹

550. Qatar's position contains a second contradiction of a more legal character. In the law of maritime delimitation, special circumstances and relevant circumstances – whether geographical or of a different nature – are used to draw the dividing line; they are not the dividing line in themselves. Qatar, however, states explicitly that "the 1947 line in itself constitutes a special circumstance"⁷¹² – thus confusing a circumstance to be taken into account in drawing a boundary line with the boundary line itself. Over the greater part of its extent, the boundary which Qatar claims before the Court coincides exactly with the British 1947 line. As appears from Map 3, the sole difference between the boundary which Qatar claims to draw "with due regard to" the British 1947 line and a boundary drawn "along" the 1947 line lies in the fact that Qatar asks the Court to "disregard" the segment of the 1947 line which does not suit it – namely, the segment lying to the south of the point L: "the southern part of the 1947 line (south of point L) now has to be disregarded."⁷¹³ The same selective process leads Qatar to promote what it deems to be the binding nature of the 1947 line in relation to Janan Island and yet reject it insofar as the rest of the Hawar Island group, and Fasht ad Dibal and Qit'at Jaradah (recognised therein as Bahraini), are concerned.⁷¹⁴ How can the so-called "decision" of 1947 be "a highly relevant circumstance" over a part of its extent, to the

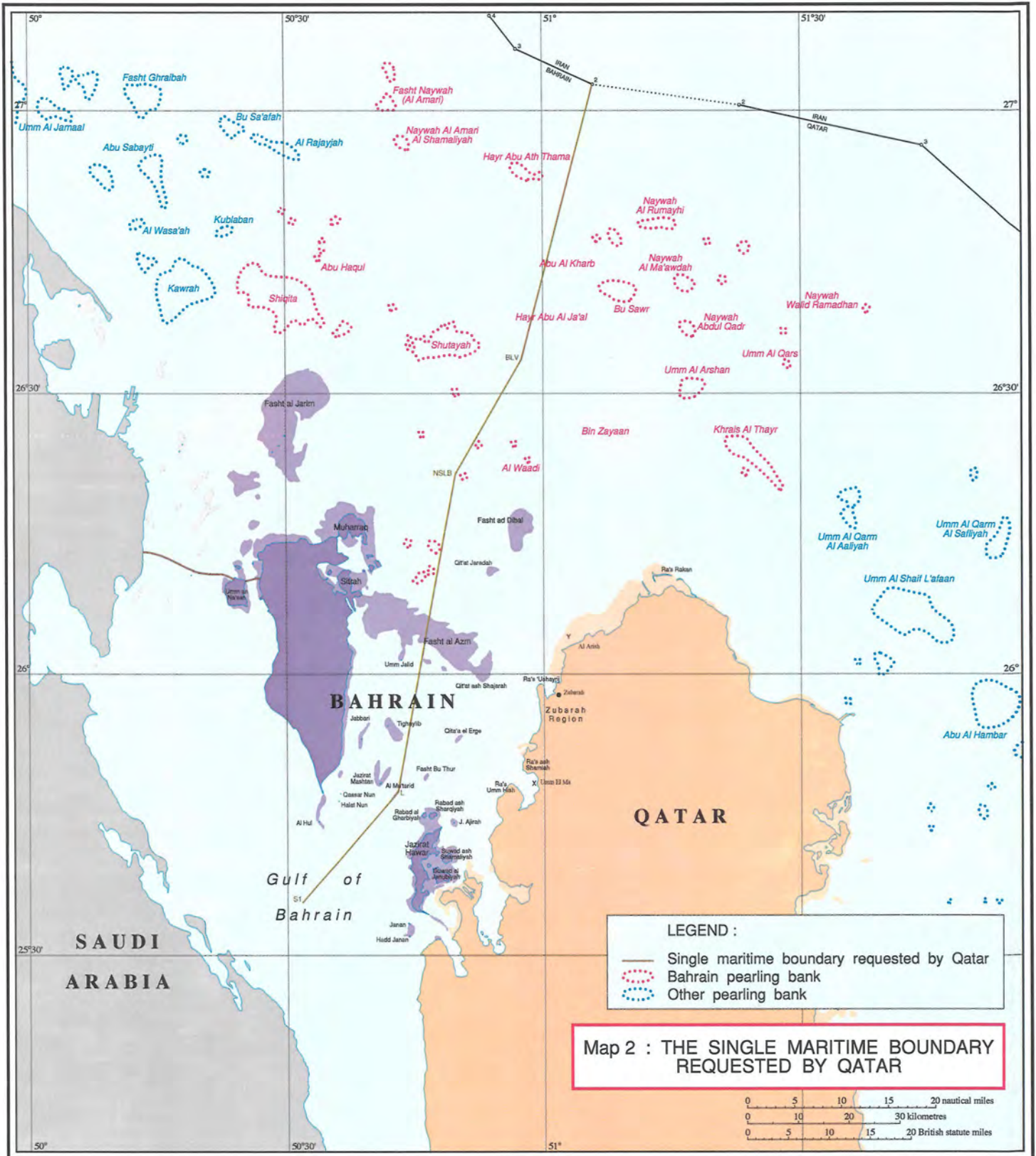
⁷¹⁰ QM para. 12.62.

⁷¹¹ QM p. 307.

⁷¹² QM para. 11.39.

⁷¹³ QM para. 11.20. The word "disregarded" subsequently reappears on three occasions in a few lines (QM paras. 11.23, 11.24, 11.26), and then again at QM paras. 11.30 and 11.33.

⁷¹⁴ See Section 2.3.I, *supra*.



point that the single maritime boundary to be delimited today is supposed to coincide with it, if it has to be "disregarded" over another part of its extent? According to Qatar's position, the British 1947 line is alternately a highly relevant circumstance and a totally irrelevant circumstance. This "pick and choose" approach attaches such a selective meaning to the expression "with due regard to" as to destroy its value. In fact, what Qatar refers to as "due regard to the 1947 line" turns out to mean, in concrete terms, "disregarding the 1947 line southwards from point L and following it northwards from point L."

551. If Qatar's proposition that the British 1947 is a highly relevant circumstance and that the Court "cannot act as if that line had never existed"⁷¹⁵ were correct, then it should logically extend to that segment of the British 1947 line which enclaves the Hawar Island group, which the letters of 23 December 1947 confirmed as being subject to Bahrain's sovereignty. The so-called British "decision" should similarly be respected where it recognises sovereign rights in Bahrain's favour over Fasht ad Dibal and Qit'at Jaradah. In these respects also, Qatar's position is inconsistent and self-contradictory.

SECTION 7.3 The British 1947 line is irrelevant to the delimitation which the Court is requested to effect

A. The letters of 23 December 1947, unlike Britain's arbitral award of 1939 in relation to the Hawar Islands, did not constitute a "decision" purporting to bind Bahrain and Qatar, nor was it regarded by the Parties as such

552. Qatar's Memorial refers continually to "the 1947 British decision". To the extent that Qatar thereby intends to imply that the letters of 23 December 1947 notified the respective Rulers that the British Government had made a definitive decision in relation

⁷¹⁵ QM para. 11.19.

to the division of the seabed, Qatar's characterisation of Pelly's letters is manifestly inaccurate.

553. Bahrain has shown above⁷¹⁶ that its title to the Hawar Islands is a legally settled matter. This is so, whether the British decision of 1939 is viewed as an arbitral award, or as a political decision implementing rights and obligations that Britain had assumed under the international agreements between it and, respectively, Bahrain and Qatar.

554. Bahrain has shown that the 1939 British decision is entitled to recognition on the basis that both Qatar and Bahrain gave their implied consent to Britain's jurisdiction by participating without protest in the procedure which resulted in the British decision of 1939.⁷¹⁷ Indeed, the proceedings of 1938-1939 followed a request by the Ruler of Qatar that the British Government determine his claim to sovereignty over the Hawar Islands. Qatar thus gave its consent to Britain's decision-making by actively seeking it and then participating in the proceedings.⁷¹⁸ The 1947 letters, by contrast, were in no sense the result of proceedings – whether arbitral or otherwise – conducted by the British Government with the express or implied consent of the Parties. Neither Bahrain nor, to the best of Bahrain's knowledge, Qatar at any time requested that the British Government delimit any kind of seabed or maritime boundary or consented to any such determination by the British Government.

555. Again, Bahrain has shown that the *audi alteram partem* principle was fully respected in the procedure which led to the British decision of 1939.⁷¹⁹ Each Party was given a proper and equal opportunity to present its case. By contrast, the British Government did not, prior to 23 December 1947, solicit or receive the views of the

⁷¹⁶ Chapter 3, *supra*.

⁷¹⁷ See Section 3.3 C (ii), *supra*.

⁷¹⁸ Section 3.4 C, *supra*.

⁷¹⁹ Sections 3.5 B and C, *supra*.

Parties in relation to the 1947 letters, nor did it conduct any kind of arbitral or adversarial procedure.

556. Finally, Bahrain has shown that the British decision of 1939 is both the confirmation and the foundation of a settled state of affairs.⁷²⁰ Long before the decision of 1939 and continuously since 1939, Bahrain has remained in full possession of and has exercised full sovereignty over the Hawar Islands to the degree required by their physical character,⁷²¹ while Qatar has exercised no sovereignty over the Hawar Islands, either prior to or after the 1939 decision. A very different situation pertains with respect to the 1947 letters, in relation to which Bahrain has recognised no authority. Long before 1947 and continuously since 1947, Bahrain has exercised sovereignty and authority over maritime features and maritime areas lying both to the west and to the east of the British 1947 line.

557. All three of the essential elements referred to above, which were present for the 1939 decision, were, in Bahrain's submission, absent in the case of the 1947 letters.

558. The language of the 1947 letters is conspicuous by its failure to definitively determine anything. This failure is unsurprising in view of the British Government's deliberate decision not to conduct any kind of adversarial, let alone arbitral, procedure as a preliminary to the 1947 letters, and in view of the lack of manifestation of any desire on the part of the Rulers of either Bahrain or Qatar that the British Government should make any determination of the maritime boundary between the respective States. In his letters, the British Political Agent "informed" the respective Rulers that the British Government "has, for some time past, had under consideration the boundary which should delimit" their respective rights in the seabed lying between their respective territories. He "forward[ed] ... for ... information" a map "showing the line

⁷²⁰ Section 3.6, *supra*.

⁷²¹ See *supra*, paras. 432 *et seq.*; see also *supra*, para. 553.

which, His Majesty's Government considers, divides in accordance with equitable principles the sea-bed aforesaid," and stated that

"HM Government will, in future, regard all the sea-bed lying to the west of this line as being under the sovereignty of [the Ruler of Bahrain] and all the sea-bed lying to the east of it as being under the sovereignty of [the Ruler of Qatar]."⁷²²

Thus, the purpose of the letters was not to notify the Rulers of a decision which they would be required to respect, but merely to inform them that the British authorities would henceforth consider the seabed as being divided by the line described therein, particularly in the course of their dealings with the two oil companies concerned. The letters purported only to express the policy of the United Kingdom. Moreover, the purported division was expressly stated to be provisional and subject to revision. Pelly stated at the end of the letters that:

"... this division has been made on the basis of the maps and information available and detailed application of the principles of the division is subject to revision in the event of more exact geographical data being forthcoming at a later date."⁷²³

559. The contrast could not be sharper between the language of the 1947 letters and that of the 1939 decision. In 1939, the Resident wrote:

"I am directed by His Majesty's Government to inform you that, after careful consideration of the evidence adduced by Your Highness and the Sheikh of [Qatar/Bahrain], they have decided that these islands belong to the State of Bahrain and not to the State of Qatar."⁷²⁴

1939 was a binding decision, 1947 was not.

⁷²² Letter from British Political Agent to Ruler of Qatar, 23 December 1947. QM Ann. IV.115, Vol. 10, p. 71; Letter from British Political Agent to Ruler of Bahrain, 23 December 1947. QM Ann. IV.116, Vol. 10, p. 75.

⁷²³ *Ibid.*

⁷²⁴ QM Ann. III.208, Vol. 8, p. 39, and QM Ann. III.209, Vol. 8, p. 43. (Emphasis added.)

560. The British authorities clearly considered the division which they contemplated to be subject to the assent of the respective Rulers, as appears from the British preparatory documents cited in Qatar's Memorial and reproduced in the Annexes thereto.⁷²⁵ Thus, the Admiralty wrote on 19 May 1947 to the Indian Office:

"When we reach the stage of making concrete proposals the two States might be prepared to agree to simplified straight median lines...."⁷²⁶

Two months later, the Foreign Office wrote in a letter dated 28 July 1947 that

"... this announcement might be made in the first place in tentative form and six months allowed for the raising of objections...."⁷²⁷

This proposal was accepted by the Secretary of State for Commonwealth Relations, who nevertheless suggested in a letter dated 10 November 1947 that a shorter time limit should be allowed.⁷²⁸ On 29 November 1947, the British Political Resident in the Gulf recommended that the Commonwealth Relations Office abandon the idea of a period for objections "as this will inevitably result in lengthy representations from both Rulers." He therefore suggested that the British position "should be announced in an absolute form, but that if any valid objections are received they should be considered."⁷²⁹

561. Qatar's Memorial rightly states that the division of the seabed envisaged by the British letters was accepted neither by Bahrain nor by Qatar.⁷³⁰ As the Legal Adviser of the Foreign Office, Sir Eric Beckett, wrote on 14 July 1949, "none of the Rulers is under

⁷²⁵ QM paras. 10.13 *et seq.*

⁷²⁶ Letter from Admiralty to India Office, 19 May 1947. QM Ann. IV.97, Vol. 9, p. 482. (Emphasis added.)

⁷²⁷ Letter from Foreign Office to India Office, 28 July 1947. QM Ann. IV.101, Vol. 10, p. 5.

⁷²⁸ Express letter from Secretary of State for Commonwealth Relations to British Political Resident, 10 November 1947. QM Ann. IV.108, Vol. 10, p. 39.

⁷²⁹ Telegram from British Political Resident to Commonwealth Relations Office, 29 November 1947. QM Ann. IV.111, Vol. 10, p. 53.

⁷³⁰ QM paras. 3.83-3.84, 6.244, 10.22 *et seq.*, 10.27 *et seq.*

564. In fairness to the United Kingdom, one must note that in 1947 it was, indeed, scarcely possible to go beyond a pragmatic resolution of the immediate problem, for two reasons.

565. The first reason is that, as the 1947 letters themselves acknowledge, little accurate geographical information concerning the region existed at that time. Qatar's Memorial admits that the region was an "area which was largely unsurveyed" and that it was "difficult to have a precise knowledge of the detailed configuration of the coastlines."⁷⁴⁰ The British authorities may therefore be excused for having decided to ignore some of Bahrain's islands and low-tide elevations, and to focus on the main island of Bahrain,⁷⁴¹ but the same excuse cannot be invoked by Qatar, fifty years later and with accurate geographical information at its disposal, to justify ignoring the geographical reality.

566. There is a second, compelling reason. The 1947 line could not have purported to constitute a delimitation of the continental shelf on a legal basis, because no legal rules, whether based on international treaties or drawn from State practice, existed at that time in relation to the delimitation of the continental shelf. Indeed, only a few years later, Lord Asquith held that the doctrine of the continental shelf itself had not yet entered the realm of positive international law.⁷⁴² In assessing the legal value of the 1947 line, it should be remembered that in 1953 – six years later – the International Law Commission still felt, in relation to the question of the delimitation of the continental

6 June 1947. QM Ann. IV.99, Vol. 9, p. 489; Minute dated 22 July 1947 by Evans. QM Ann. IV.100, Vol. 9, p. 495. Even the reference to the principles of the Truman Proclamation did not receive unanimous support within the British administration (see, e.g., Minute dated 12 March 1947 by Beckett. QM Ann. IV.95, Vol. 9, pp. 468 and 474).

⁷⁴⁰ QM para. 10.17; See para. 10.19.

⁷⁴¹ See QM para. 10.17.

⁷⁴² Petroleum Development (Trucial Coast) Ltd v. Sheikh of Abu Dhabi, International Law Reports XVIII (1951), pp. 144 *et seq.*, especially pp. 155 *et seq.*

shelf, that there was a legal vacuum in this area – so much so that it was suggested that disputes in this area be submitted to arbitration *ex aequo et bono*.⁷⁴³ Only following the report of the Committee of Experts, which suggested *de lege ferenda* that the rules governing the delimitation of the territorial sea might also be applied to continental shelf delimitations,⁷⁴⁴ was the Commission able to proceed towards defining a legal basis for the delimitation of the continental shelf.

567. Qatar acknowledges that in 1947 there existed no rules of law worthy of the name to govern the delimitation of the continental shelf:

"At the time the British decision was taken, there was no helpful precedents or established rules of delimitation, and no specific rule or method of delimitation could yet be regarded as being already part of the emerging legal doctrine of the continental shelf."⁷⁴⁵

In the light of this summary of the state of international law with respect to the continental shelf in 1947, it is difficult to understand how Qatar ventures to argue that the British 1947 line not only was based on legal rules, but was based on legal rules which are still valid today.

C. The 1947 letters related exclusively to the delimitation of the continental shelf, and expressly did not purport to delimit the superjacent waters

568. As Bahrain has demonstrated, the delimitation of a boundary between the areas subject to Bahrain's and Qatar's respective sovereign rights was neither the sole nor even the principal objective of the process which led to the letters of 23 December 1947. The principal concern of the British authorities was to effect a division of the seabed between the two interested oil companies. This appears from the letter dated 3 August

⁷⁴³ Yearbook of the International Law Commission 1953, Vol. II, pp. 48-49, 216 (paras. 82 and 84).

⁷⁴⁴ *Op. cit.*, p. 79.

⁷⁴⁵ QM para. 10.15.

1946, also quoted, in which the Secretary of State for India requested the British Political Resident in the Gulf to examine the possibility of defining a line which

"... could be regarded either as simply demarcating the areas in which [His Majesty's Government] are willing to permit the respective Oil Companies to operate, or as dividing the sea-bed, including the portion outside territorial waters, between Bahrain and Qatar, and allotting to each Ruler virtual sovereignty over his respective portion without prejudice to existing navigation rights."⁷⁴⁶

Thus, at the outset, the British authorities envisaged two possibilities. One was simply to demarcate the areas in which the two oil companies would be permitted to operate; the other was to go further and to delimit the areas of continental shelf over which each of the two Rulers could claim to exercise sovereign rights. The Secretary of State added that if the second option were chosen, the delimitation of the continental shelf would in any event be "without prejudice to navigation rights", *i.e.*, without affecting the rights of either State in relation to the superjacent waters.

569. In the end, the second option was selected. The letters of 23 December 1947 referred to "the boundary which should delimit Your Excellency's rights in the bed of the sea...." They also enclosed for the attention of the respective Rulers

"... a map showing the line ... which, His Majesty's Government considers, divides in accordance with equitable principles the sea-bed...."

The letters went on to inform the Rulers that

"... His Majesty's Government will, in future, regard all the sea-bed lying to the west of this line as being under the sovereignty of ... [the Sheikh of Bahrain], and all the sea-bed lying to the east of it as being under the sovereignty of [the Sheikh of Qatar]."

Finally, they stated that:

⁷⁴⁶ Letter from Secretary of State for India to British Political Resident, 3 August 1946. QM Ann. IV.88, Vol. 9, p. 422.

"This decision covers the sea-bed only and not the waters above and is without prejudice to existing navigation rights."

The 1947 letters could not have been more explicit: rights over the superjacent waters were specifically excluded from their scope.

570. Qatar's attempt to persuade the Court to consider the 1947 line as a "highly relevant circumstance" for the purpose of delimiting a single maritime boundary thus stands condemned by the wording of the British letters, their manifest intention, and the context in which they were prepared and dispatched.

571. Qatar is evidently conscious of the difficulty inherent in asking that the single maritime boundary which the Court is now requested to delimit be drawn so as to coincide with the line which the British authorities proposed in 1947 for the sole purpose of separating the continental shelves of the two States. Qatar recognises that the maritime boundary will be a "single line in the sense that it will divide the respective areas of sea-bed, subsoil and superjacent waters, and will be an all-purpose dividing line", and that "[i]t is quite obvious that different questions arise immediately as far as the pre-existing dividing line drawn in 1947 for the continental shelf is concerned."⁷⁴⁷ Qatar's uneasiness in this respect is obvious. Qatar asks: "Could the solution of transforming a continental shelf delimitation into a single maritime boundary applying also to [exclusive economic zone] delimitation be transposed in the present case?"⁷⁴⁸ This question is not answered by Qatar's Memorial.

572. Without entering into a detailed discussion of this problem in all its aspects, Bahrain observes that Qatar's Memorial refers later on to "the application (exhaussement)" of the continental shelf delimitations effected by the Iran/Qatar Agreement of 1969 and the Bahrain/Iran Agreement of 1971 to fishing zones and

⁷⁴⁷ QM para. 11.16.

⁷⁴⁸ QM para. 11.17.

exclusive economic zones. Qatar recognises that this "application ('exhaussement')" – *i.e.*, the projection of the agreed line upward through the water column – requires the consent of the parties, and considers that such consent has been given in relation to the Iran/Qatar Agreement and the Bahrain/Iran Agreement.⁷⁴⁹ Bahrain notes in passing that the parties' consent was equally important to the Court's decision to delimit a single maritime boundary in the Gulf of Maine case.⁷⁵⁰ In the case of the Maritime Delimitation in the Area between Greenland and Jan Mayen, where one party requested that the Court delimit a single maritime boundary while the other party opposed this request, the Court proceeded to effect separate continental shelf and fishing zone delimitations.⁷⁵¹ Despite the tendency, in State practice and in international jurisprudence, towards a single, all-purpose maritime boundary, the Parties certainly retain the right to distinct delimitations in respect of the continental shelf, on one hand, and of fishing zones or exclusive economic zones, on the other.

573. In the present case, even supposing – *quod non* – that the 1947 letters effected a continental shelf delimitation between Bahrain and Qatar which is valid today, this delimitation may not, in any event, be projected upward through the water column so as to become a single all-purpose maritime boundary without Bahrain's consent; and to this Bahrain would not consent.

574. For this reason also, Qatar's claim for a single maritime boundary which coincides for the greater part of its extent with the 1947 line should be rejected.

D. The concepts and rules by reference to which the 1947 line was drawn do not correspond to the contemporary international legal concepts and rules

⁷⁴⁹ QM paras. 12.8-12.9.

⁷⁵⁰ See *supra*, para. 458.

⁷⁵¹ I.C.J. Reports 1993, pp. 57-58, paras. 43-44.

under which the Parties have called upon the Court to delimit a single maritime boundary between the two States

575. To the extent that the British authorities, in their search for a pragmatic solution, may have referred to any legal concepts and rules, and even assuming, contrary to fact, that such concepts and rules were central to their proposals, these concepts and rules in any event do not correspond to the concepts and rules of contemporary international law under which the Court is asked, by the agreement of the two Parties, to delimit a single maritime boundary between them.

576. In the first place, the very concept of the continental shelf has changed significantly. Qatar's Memorial itself observes that the British "decision" of 1947 "was taken within the context of the then emerging continental shelf legal doctrine."⁷⁵² The Truman Proclamation, which, as the Court was to state in 1969, "came to be regarded as the starting point of the positive law on the subject and the chief doctrine it enunciated",⁷⁵³ had been issued only a few months previously. Much uncertainty still prevailed in relation to the concept of the continental shelf and its legal regime, as is clear from numerous academic studies of that period and, even more so, from the proceedings of the International Law Commission in the 1950s. Since then, the concept has acquired legal authority and undergone continual evolution. At the 1958 Geneva Conference, the continental shelf was defined by reference to criteria based on depth and exploitability. In the 1982 Convention, the continental shelf was defined principally by reference to a distance-based criterion, supplemented by the notion of natural prolongation. The concept of natural prolongation, to which in 1969 the Court had attributed a central place in the theory of the continental shelf, was itself to undergo a profound evolution, which detached it from its physical components and gave it a

⁷⁵² QM para. 11.13.

⁷⁵³ North Sea Continental Shelf, I.C.J. Reports 1969, pp. 32-33, para. 47.

legal character dominated by the criterion of distance. The concept of the continental shelf thus became partially merged with the concept of the exclusive economic zone at UNCLOS III. The notion of the exclusive economic zone, unknown in 1947, was therefore to bring about a fundamental change in the theory of the continental shelf. In view of the profound differences between the embryonic notion of the continental shelf known to the British authorities in 1946-1947, and the modern concept developed by the jurisprudence of the Court in the light of international treaties and State practice, Qatar's claim that the Court should consider the 1947 seabed line a relevant circumstance for the present delimitation of a single maritime boundary is utterly incongruous.

577. Along with the profound change in the concept of the continental shelf over the last half-century, the principles and rules governing the delimitation of the continental shelf have also changed. In 1947, as Qatar's Memorial admits, these principles and rules were not only embryonic; they did not exist.⁷⁵⁴ The formula of delimitation "in accordance with equitable principles", laid down by the Truman Proclamation, was never subsequently to be abandoned and became, indeed, central to the law of maritime delimitation. The concepts of equity, and of equitable principles, which referred, at the outset, to a subjective, almost discretionary equity, without any precise criteria, finally received a legal content and became distinguishable from the notion of *ex aequo et bono*, in particular in the judgments of the Court in the Libya/Malta and Jan Mayen cases. The concept of delimitation according to the equidistance-special circumstances rule did not appear until the proceedings of the International Law Commission in 1953, and that of relevant circumstances did not take its place in the law of maritime delimitation until the Court's judgment in the North Sea Continental Shelf cases of 1969 – the two concepts being merged in 1993 in the Jan Mayen case. To assert, as Qatar does, that "[a]lthough the expression was not used at the time for obvious reasons, the concept of relevant circumstances was unquestionably at the root of the choice made by

⁷⁵⁴ See *supra*, para. 567.

the British authorities⁷⁵⁵ in 1947, attributes to the British authorities a quasi-divine legal prescience. Qatar's position is even less defensible when it is recalled that the notion of a single maritime boundary only appeared on the legal scene several decades later, and that the scope, validity independent of the parties' consent, and implementation of this notion have yet to be fully determined. Whether one considers the legal concepts underlying the process of maritime delimitation or the method of delimitation, the conclusion is inevitable: the line envisaged by the British authorities in 1947 cannot be considered relevant for the purposes of the present delimitation, which is to be effected in the light of contemporary international law as it has emerged from, in particular, the Court's most recent judgments.

578. In many other respects, the contemporary law of the sea bears only a distant resemblance to the law of the sea as it existed in 1947. Terminology, concepts and rules have all changed. A review of the British preparatory documents to the 1947 letters, which are contained in the Annexes to Qatar's Memorial, demonstrates the extent of the changes which have occurred. It was thought at that time that an island was only entitled to a territorial sea if it was habitable, or even if it was in fact inhabited.⁷⁵⁶ Today the rule is that every island, without exception, is entitled to a territorial sea. The concepts of island, rock and shoal were not well distinguished from one another, and were certainly not distinguished according to the criteria accepted by contemporary international law. As Bahrain has shown above, even the terminology employed at that time differed from the terminology which is employed today. It was widely believed that "shoals" could never generate a territorial sea entitlement: this view is reflected by the statement in the 1947 letters that "the Fasht ad Dibal and Qit'at Jaradah shoals ...

⁷⁵⁵ QM para. 11.40.

⁷⁵⁶ See, for example, Letter from Foreign Office to India Office, 28 July 1947. QM Ann. IV.101, Vol. 10, p. 7; Letter from Foreign Office to Commonwealth Relations Office, 6 October 1947. QM Ann. IV.106, Vol. 10, p. 29; Aide-Mémoire from British Embassy in Washington, 12 December 1947. QM Ann. IV.114, Vol. 10, p. 70.

should not be considered as islands having territorial waters." Widely differing and often contradictory views were expressed at that time on this issue and the legal rules were not settled. Indeed Qatar admits this: referring to the rules which today are set out in the 1982 Convention, Qatar's Memorial states:

"However, things have not always been so clear. In particular, at the time of the British decision of 1947, and for some years later, there were differing views among British Lawyers and decision-makers as to the exact definition of these concepts."⁷⁵⁷

579. In the fifty years since the Pelly letters were written, the law of the sea has been radically transformed – both in relation to the rights of coastal States over the maritime zones adjacent to their coasts and in relation to the delimitation of maritime zones as between States having opposite or adjacent coasts. These fundamental changes suffice to deprive the British 1947 line of all possible relevance to the present delimitation.

E. The 1947 line does not rest on any known or identifiable legal ground

580. The only legal justification given by the British authorities in support of the line which they proposed was that this line divided the seabed "in accordance with equitable principles". This was a general reference to an essentially subjective kind of equity, whereas the contemporary law of the sea refers to equitable principles of an objective character, or, in other words, to equitable principles which "display consistency and a degree of predictability."⁷⁵⁸ Indeed, "equitable principles" has now become a term of art referring to a judicially-elaborated code of rules and principles for maritime boundary delimitation. More importantly still, the "equitable principles" to which the 1947 line purported to conform are impossible to identify. Qatar's observation that the line conforms to three "criteria" ("exclusive consideration of the two main coasts", "selection

⁷⁵⁷ QM para. 10.56.

⁷⁵⁸ Libya/Malta, I.C.J. Reports 1985, p. 39, paras. 45-46; Jan Mayen, I.C.J. Reports 1993, pp. 63-64, para. 58.

of fixed turning points", "a simplified line"⁷⁵⁹) merely replicates the 1947 letters, without providing an explanation of the rationale for the line. Qatar recognises that "[t]he 1947 line is neither an equidistant line, nor the strict or true median line."⁷⁶⁰ In other words, it is not even a mainland-to-mainland median line, since it is significantly closer to Bahrain's main island than to Qatar. The line disadvantages Bahrain, first by failing to take into account Bahrain's territory other than its main island, and second, by being displaced towards the west. How can this be justified? No one knows the answers. Qatar's assertion that "that line was based on geographical considerations"⁷⁶¹ has no authority other than Qatar's *ipse dixit*. All Qatar can provide are highly speculative explanations:

"One of the factors taken into account (although this is nowhere explicitly stated) may have been the difference in coastal lengths, the coast of the Qatar peninsula being much longer than that of the main Bahrain island."⁷⁶²

"The line ... was drawn closer to the coast of Bahrain ... apparently in view of the difference between coastal lengths."⁷⁶³

In truth, no one even knows whether the reasons behind the 1947 line were geographical.

581. Not only does the *raison d'être* of the location and course of the 1947 line remain shrouded in obscurity, but so does the *raison d'être* of the choice of the two turning points mentioned in the 1947 letters, namely the North Sitrah Light Buoy (NSLB in Qatar's Memorial) and the Bahrain Light Vessel (BLV in Qatar's Memorial). Qatar indulges in further speculation in an attempt to explain this:

⁷⁵⁹ QM paras. 10.16-10.20.

⁷⁶⁰ QM para. 10.21.

⁷⁶¹ QM para. 11.39.

⁷⁶² QM para. 10.21 (Emphasis added).

⁷⁶³ QM para. 11.14 (Emphasis added).

"Another consideration which the British Government no doubt took into account was the desirability of protecting maritime access to Bahrain through the Sitrah Channel and this probably provided sufficient reason for the choice of the North Sitrah Light Buoy and the Bahrain Light Vessel as points of reference for the drawing of the dividing line....

When the British authorities selected those points, they had in mind the requirements of maritime access to Bahrain through the Sitrah Channel, and this was probably sufficient motivation for the choice of these aids to navigation as points of reference for the drawing of the dividing line...."⁷⁶⁴

"No doubt", "probably": Qatar's speculation fails to stand up to a simple objection: Pelly's letters stated that "[t]his decision covers the sea-bed only and not the waters above and is without prejudice to navigation rights." Whatever the reasons for the selection by the British of the points referred to as "North Sitrah Light Buoy" and "Bahrain Light Vessel" as turning points for the 1947 seabed line, the selection of these points cannot have been based on concern for surface traffic.

F. The 1947 line has no relevance in the light of the supervening factor created by the extension of the territorial sea of both countries from 3 to 12 miles

582. As already noted,⁷⁶⁵ Qatar observes on several occasions that the extension of the two States' territorial seas from 3 to 12 nautical miles, in 1992 and 1993,

"... has generated a new legal situation with respect to which the weight to be given to the 1947 dividing line has to be evaluated."⁷⁶⁶

Prior to this extension, as Qatar explains,

"... each of the two territorial seas had a breadth of 3 nautical miles and they did not overlap, thus leaving an area of continental shelf and

⁷⁶⁴ QM paras. 10.19 and 11.40 (Emphasis added).

⁷⁶⁵ See *supra*, para. 472.

⁷⁶⁶ QM para. 11.3.

superjacent high seas between the two facing coasts of Qatar and Bahrain."⁷⁶⁷

This situation, Qatar notes, continued to exist at the date of its Application, 8 July 1991.

The situation today, however, is different, as Qatar emphasises:

"Not only do the new 12-mile territorial seas overlap ... but there is also an overlap between some portion of the sea-bed as delimited in 1947 and the extended territorial waters. The latter is all the more important in that it could involve some conflict between sovereign rights pertaining to one State and the sovereignty of the other State. Thus, the request presented to the Court for the drawing of a single maritime boundary has to be examined in the light of that situation."⁷⁶⁸

583. If that part of the British 1947 line which separates the Hawar Islands from Qatar is left out of consideration – if the discussion is restricted, in other words, to that part of the 1947 line which is situated northwards of the point L – then it may be seen that, from the point of view which the British authorities adopted in 1947, which involved taking into account only the main island of Bahrain and the Hawar Islands, on one hand, and the coast of the Qatar peninsula, on the other, Qatar's comments are correct. With 3-mile territorial seas based on the conception which the British authorities had in 1947 of the two States, the 1947 line divided the continental shelf situated between the outer limits of their respective territorial seas. Between the two so-called main coasts, there was a distance sufficient for the two States' respective 3-mile territorial seas plus an area of continental shelf. In other words, in the British perspective of 3-mile territorial seas, the 1947 line would not have cut across the territorial sea of either of the two States. Applied to the present situation – and again assuming a so-called mainland-to-mainland delimitation – the 1947 line would cut across the two States' respective territorial seas, and would thus delimit their territorial seas, not according to the customary equidistance-special circumstances rule expressed in Article 15 of the 1982 Convention,

⁷⁶⁷ QM para. 11.10.

⁷⁶⁸ QM para. 11.12.

but on legal bases which no one can identify. This appears from a comparison of Map N° 14 of the Memorial of Qatar (reproduced here as Map 4) showing the 1947 line within the context of a 12-mile projection from the coasts of Bahrain's main island and the Qatar peninsula, with Map 5 showing the 1947 line within the context of a 3-mile projection from these coasts.

584. The same conclusion follows from these considerations as from those discussed earlier: the line envisaged by the British authorities in 1947 is not relevant for the purposes of the present delimitation, which is to be effected in the light of contemporary international law.

G. The 1947 line has no relevance as a source of "historic title"

585. The customary rule set out in Article 15 of the 1982 Convention provides for the equidistance line to be set aside as a line of territorial sea delimitation "when it is necessary" to do so "by reason of historic title". Qatar's Memorial states:

"While it cannot be said that any historic title has derived from [the so-called British 1947 decision], the situation thus created however does not fall far short of it."⁷⁶⁹

586. It is remarkable to find in a legal document two consecutive phrases that so blatantly contradict each other; Qatar says in effect that: (i) it cannot be said that historic title derives from the British 1947 letters, but (ii) historic title derives from the British 1947 letters. Qatar's historical argument does not call for any further comment.

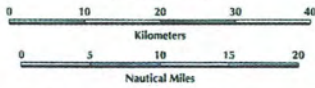
SECTION 7.4 Conclusion

587. In the final analysis, Qatar asks the Court to hold that contemporary international law calls for a single maritime boundary which, except for its southernmost and northernmost segments, is identical to the line which Britain envisaged half a century

⁷⁶⁹ QM para. 11.39.

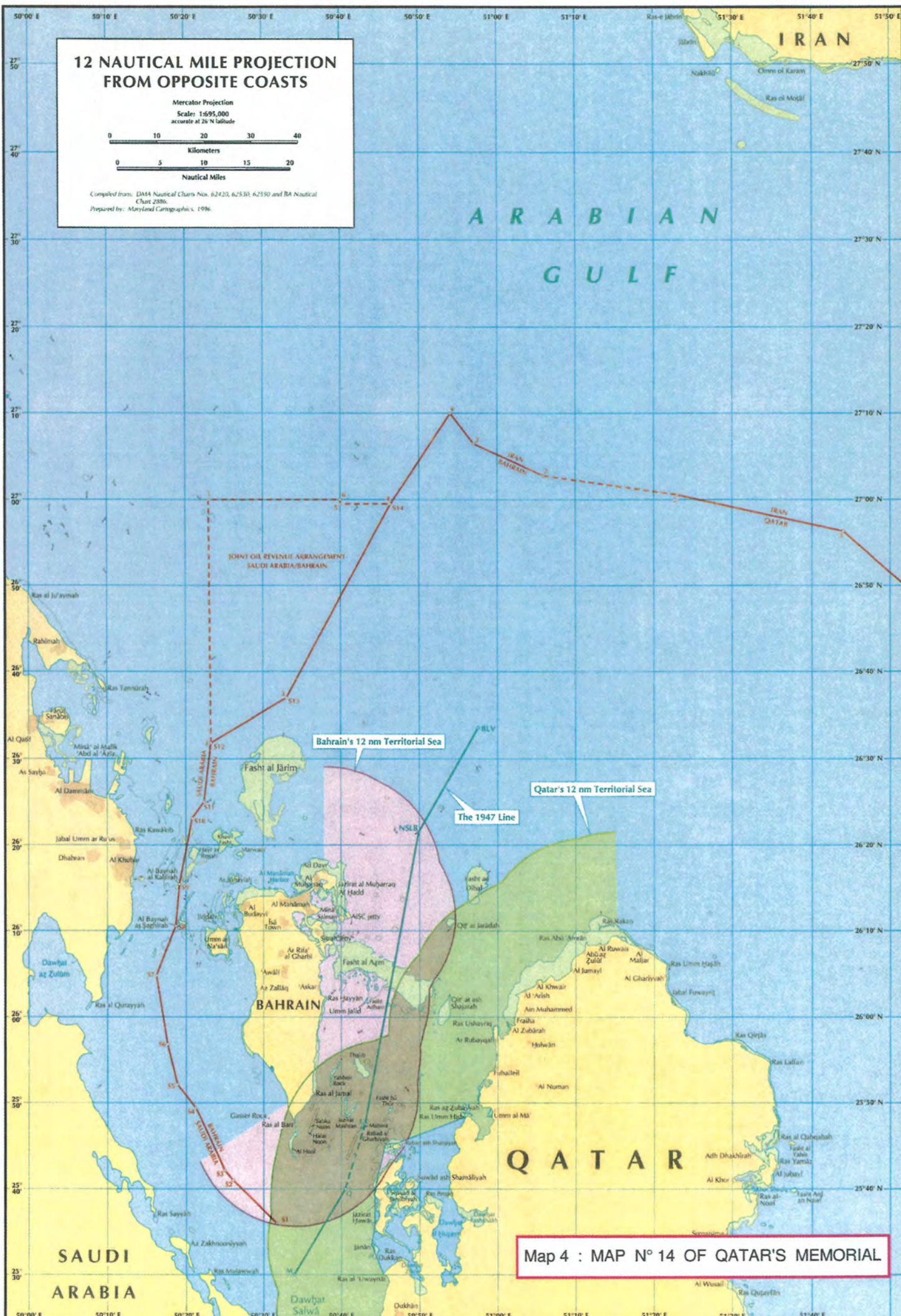
12 NAUTICAL MILE PROJECTION FROM OPPOSITE COASTS

Mercator Projection
Scale: 1:695,000
accurate at 26° N latitude

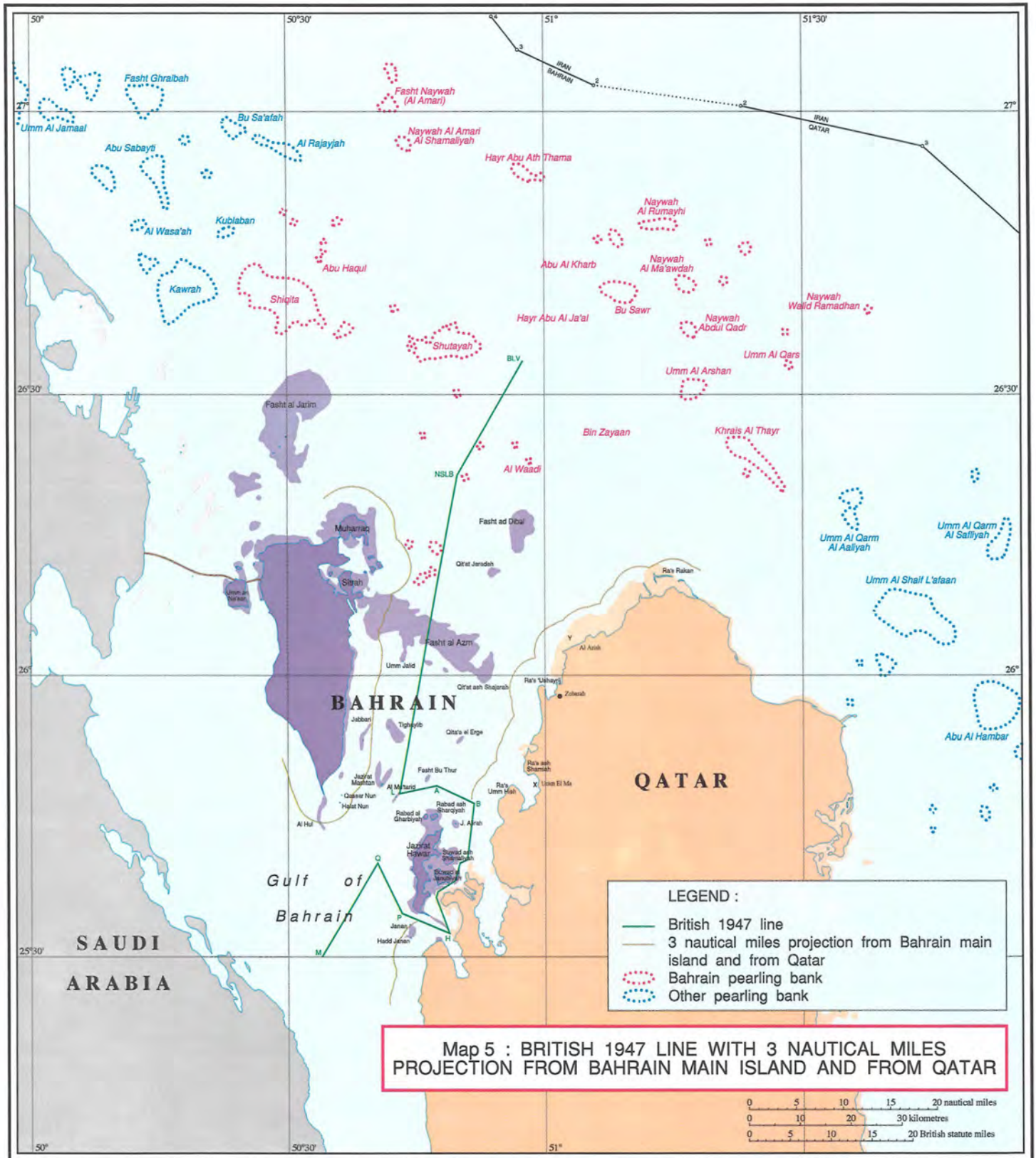


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Prepared by: Maryland Cartographics, 1996.

ARABIAN GULF



Map 4 : MAP N° 14 OF QATAR'S MEMORIAL



ago as a pragmatic proposal for dividing the seabed. Except for that part of the 1947 line which reflects Bahrain's sovereignty over the Hawar Islands, Qatar in fact asks the Court to effect the present delimitation, not "with due regard to", as Qatar's Memorial misleadingly puts it, but *in accordance with* the 1947 line. Qatar's use of the expression "with due regard to" is nothing other than sleight of hand. Qatar in fact asks the Court to hold that modern international law requires a single maritime boundary which, by a miraculous and unexplained coincidence, is supposed to be identical to a seabed division proposed by Britain fifty years ago upon bases, and for reasons, which no one can articulate.

CHAPTER 8

THE SINGLE MARITIME BOUNDARY REQUESTED BY QATAR IS NOT IN ACCORDANCE WITH THE PRINCIPLES AND RULES OF INTERNATIONAL LAW

SECTION 8.1 The two sectors

A. The Parties agree that there are two sectors

588. The Parties agree that the delimitation should be effected by dividing the region to be delimited into two sectors, and that the boundary between the two sectors should be situated at a latitude between 26° 10' and 26°30'.

B. The reasons and methodological implications of distinguishing two sectors

589. Bahrain believes that this approach is compelled here, as in earlier cases where it was followed,⁷⁷⁰ by the geographical facts of the situation. As the Court has stated, it is necessary "to take account of the fact that a change in the geographical perspective ... is to be noted at a certain point."⁷⁷¹ Not only does the relationship between the coasts differ as between the southern and northern sectors, as a glance at the map suffices to show; but also the delimitation in the southern sector is a territorial sea delimitation, whereas the delimitation in the northern sector is essentially a delimitation of maritime zones outside the territorial sea.

⁷⁷⁰ Delimitation of the Continental Shelf between UK and France, U.N. Reports of International Arbitral Awards, Vol. XVIII, pp. 58-59, para. 103, and p. 96, para. 204; Continental Shelf (Tunisia/Libya), I.C.J. Reports 1982, p. 82, para. 115, and p. 93, para. 133 C; Delimitation of the Maritime Boundary in the Gulf of Maine Region, I.C.J. Reports 1984, p. 331, para. 206.

⁷⁷¹ Delimitation of the Maritime Boundary in the Gulf of Maine Region, I.C.J. Reports 1984, p. 331, para. 206.

590. The *ratio legis* of distinguishing sectors in boundary delimitation was expressed clearly by the Chamber in Gulf of Maine: such difference of treatment is ultimately dictated by the primordial requirement of achieving an overall equitable result. When different parts of a delimitation area are so geographically different that their treatment as a single area to be delimited by a single operation would produce an inequitable result, their division into two sectors to be subjected to two separate applications of the same legal principles and methodology is an imperative of the objective of securing, by delimitation, an equitable result.

591. Distinguishing sectors in maritime boundary delimitation is not an empty analytical exercise. Significant consequences flow from the distinction. In each sector, the geographical characteristics of that sector are examined to determine if they qualify as special circumstances. For example, the relative length of coast of each State in the particular sector is compared to determine whether an adjustment in the equidistance line is appropriate. There would be no point in taking the trouble to distinguish separate sectors if, having done so, one were to invoke maritime features lying in one sector in order to delimit the maritime boundary in the other.

592. This is not to say that different principles of law and different methodologies are applied in different sectors. Quite the contrary. Bahrain considers that the delimitation which the Court is asked to effect is in its essence a single operation, implying the application of the same legal principles and methods to two dissimilar areas. Bahrain has shown⁷⁷² that the law of maritime delimitation has developed in such a way that the rules governing maritime delimitation have become progressively more unified – whether one considers customary law or treaty law; whether one considers adjacent or opposite coasts; or whether one considers the delimitation of the territorial sea, of the continental shelf, of exclusive economic zones, or a single maritime boundary.

⁷⁷² See *supra*, paras. 464 *et seq.*

C. The location of the line dividing the two sectors

593. Bahrain regards the southern sector as finishing, and the northern sector as commencing, at the line Fasht ad Dibal/Ra's Rakan. In both sectors, Bahrain proposes, consistent with the principles which the Court has set out in judgments in earlier cases, that the delimitation be effected by starting with an equidistance line between the international legal baselines of the Parties and then enquiring whether and to what extent special circumstances or relevant factors – as the case may be – may require an adjustment of the equidistance line in order to arrive at an equitable result. This is the method of delimitation which Bahrain defined and followed in its Memorial.

594. In certain respects, Qatar's conception of the division into two sectors coincides with that of Bahrain. The Parties agree that their coasts are opposite in the southern sector, but can no longer be described as opposite in the northern sector. They also agree that the delimitation in the northern sector relates essentially to areas lying beyond the outer limit of the Parties' territorial waters.⁷⁷³

595. Qatar disagrees, however, with Bahrain's dividing line, for Qatar's division is based upon the line from Muharraq to Ra's Rakan, which may be seen as the line MQ/RK (marked "Closing Line") on Map N° 20 of Qatar's Memorial (reproduced as Map 7 of this Counter-Memorial).

D. Qatar's justification for its proposed dividing line

596. "The southern sector, so Qatar argues, is the one in which the main part of the line of the British decision of 1947 is located."⁷⁷⁴ As to the northern sector, its main

⁷⁷³ BM paras. 559-560 and 635-636; QM paras. 11.2, 11.11, 12.6, 12.10. Taking into account the Zubarah Region, however, the delimitation to be effected in the southern sector is partly between adjacent coasts (BM para. 566). Concerning the relationship between the coasts in the northern sector, see *infra*, Section 8.3.A.

⁷⁷⁴ QM para. 11.2.

characteristic, so Qatar also argues, is that it calls for a "*de novo* delimitation"⁷⁷⁵ because the British 1947 line ceases at the point BLV. Qatar's division into two sectors, therefore, is based only partly upon geographical considerations, and mainly upon the British 1947 line.⁷⁷⁶

597. The division dictated by geographical considerations does not, however, coincide with the division which the 1947 line would dictate. The separation between the two sectors on a geographical basis is located at a latitude of approximately 26°10' to 26°20'.⁷⁷⁷ On the basis of the 1947 line, by contrast, the southern sector should terminate, and the northern sector commence, in the point BLV, since the 1947 line ends at this point. This leads to a continual equivocation in Qatar's Memorial whereby the northern sector is described as commencing alternately at the line Ra's Rakan/Muharraq and at the point BLV.⁷⁷⁸

E. The consequences of Qatar's contradiction

598. Since Qatar is effectively claiming a boundary coincident with the 1947 line as far north as the point BLV, both to the south and to the north of the Ra's Rakan/Muharraq line, why does Qatar wish to define the division between the two sectors by reference to this line? Qatar's reason for invoking the Ra's Rakan/Muharraq line may be found in its need for a "notional" and "imaginary"⁷⁷⁹ line to serve as the "closing line"⁷⁸⁰ of a fictitious "bay" to which it proposes to draw a perpendicular. In

⁷⁷⁵ QM para. 12.5.

⁷⁷⁶ It may be noted that this division is presented by Qatar not in Chapter IX of its Memorial, devoted to a "General Presentation of the Relevant Maritime Area", but in Chapter XI, entitled "The Single Maritime Boundary and the 1947 Line."

⁷⁷⁷ QM para. 11.2. See also Map N° 17 of Qatar's Memorial.

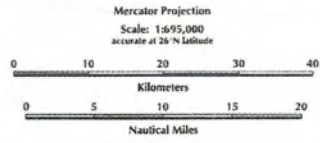
⁷⁷⁸ QM paras. 11.2, 12.4, 12.7, 12.13, 12.20.

⁷⁷⁹ QM paras. 11.2 and 12.10.

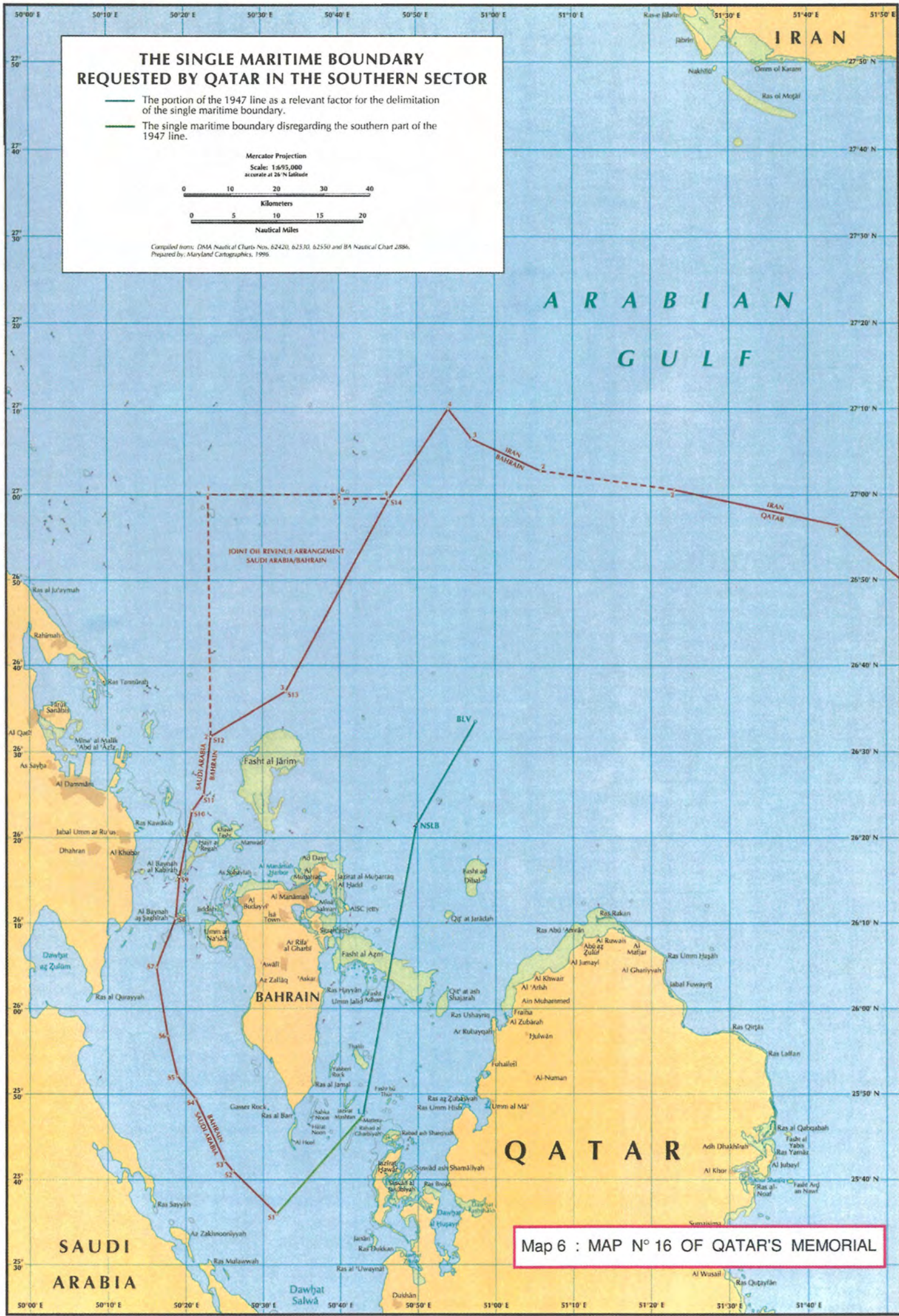
⁷⁸⁰ QM para. 12.63. See Maps N° 17, 20 and 21 of Qatar's Memorial.

THE SINGLE MARITIME BOUNDARY REQUESTED BY QATAR IN THE SOUTHERN SECTOR

- The portion of the 1947 line as a relevant factor for the delimitation of the single maritime boundary.
- The single maritime boundary disregarding the southern part of the 1947 line.



Compiled from: DMA Nautical Charts Nos. 62420, 62530, 62550 and BA Nautical Chart 2886.
Prepared by: Maryland Cartographics, 1996



Map 6 : MAP N° 16 OF QATAR'S MEMORIAL

the final analysis, Qatar's division into two sectors is motivated not so much by geographical considerations as by Qatar's need for a "closing line" upon which to base its otherwise unsupportable perpendicular to the north of the point BLV. Bahrain's Counter-Memorial will discuss this aspect in more detail when examining the boundary claimed by Qatar in the northern sector.⁷⁸¹

SECTION 8.2 The southern sector

599. The boundary claimed by Qatar in the southern sector is depicted on Map N° 16 of Qatar's Memorial, reproduced here as Map 6. According to its legend, this map shows in blue "the portion of the 1947 line as a relevant factor for the delimitation of the single maritime boundary", and in green "the single maritime boundary disregarding the southern part of the 1947 line".

A. The segment of the boundary requested by Qatar to the south of point L

600. To the south of point L, the boundary claimed by Qatar diverges from the British 1947 line. Far from being treated as a "special circumstance", the 1947 line is here "disregarded". Qatar resists a delimitation of the maritime boundary which recognises the fact that the Hawar Islands form an integral part of the insular and archipelagic ensemble comprising the State of Bahrain. Qatar rejects, therefore, that segment of the British 1947 line which confirms and draws the inevitable consequences of Bahrain's sovereignty over the Hawar Islands, a matter which has been *res judicata* since the 1939 award. Furthermore, Qatar considers that the southernmost point of the single maritime boundary to be delimited by the Court cannot be the point M from which the British 1947 line commences in the south, *i.e.*, the point situated at 25°30'00" N 50°33'55" E.⁷⁸² The reason given by Qatar is that this point "is clearly situated within the maritime zone

⁷⁸¹ See *infra*, Section 8.3.

⁷⁸² See QM para. 11.27.

Hawar Islands, which the British authorities suggested in 1947 on the basis of a territorial sea of 3 miles, is now incorporated in Bahraini waters. Today, Bahrain's territorial sea extends from the main island of Bahrain to the Hawar Islands without interruption.

B. The segment of the boundary requested by Qatar from point L to the intersection with the so-called "closing line"

606. Qatar's description of this segment, in the legend of its Map N° 16, as the portion of the 1947 line as a "relevant factor for the delimitation of the single maritime boundary",⁷⁹¹ is both euphemism and understatement. What Qatar seeks to conceal is that, over this segment, the line claimed by Qatar and the British 1947 line are one and the same. As already noted,⁷⁹² the segment of the boundary claimed by Qatar to the north of the point L is the 1947 line.

607. For this very reason, the segment of the boundary claimed by Qatar in the southern sector from point L northward is open to all of the objections which Bahrain detailed above, and which it suffices to recall briefly here:

- (a) Qatar's proposed line is constructed on the basis of an assumption that none of the islands or other relevant maritime features making up the State of Bahrain, other than the main island of Bahrain, should be taken into account. For this very reason, it misrepresents the integrated insular and archipelagic quality of the State of Bahrain and presents a caricatured, indeed amputated image of the Bahrain coast, as if it were rectilinear and perfectly regular. It also misapplies the principle that every maritime delimitation must start from the parties' coasts

⁷⁹¹ See QM para. 11.34.

⁷⁹² See *supra*, para. 598, and Map 3.

as they are represented by the baselines from which the breadth of their territorial seas is measured.

- (b) The course of this segment of Qatar's proposed line has no known or even identifiable rationale and rests on no legal basis.
- (c) Qatar claims sovereignty over Qit'at Jaradah, not on the basis of any effective exercise of sovereignty by Qatar, but solely because Qit'at Jaradah would be situated to the east of the boundary which Qatar claims.
- (d) Qatar is silent as to the question of sovereignty over the other maritime features situated to the east of the boundary which it claims. This might be interpreted as recognition on Qatar's part of Bahrain's sovereignty over these features, and of the insular and archipelagic character of the State of Bahrain. On this assumption, however, the boundary claimed by Qatar would deprive those of Bahrain's features, insular or other, which are situated to the east of that boundary of their maritime projections under international law. If, on the other hand, Qatar's silence regarding the maritime features other than Qit'at Jaradah is to be interpreted as indicating that in Qatar's view the features situated to the west of the boundary claimed by Qatar belong to Bahrain while those situated to the east of that boundary belong to Qatar, then territorial sovereignty would become an accessory or consequence of maritime delimitation, which would clearly be unacceptable. Under the principles and rules governing territorial sovereignty, Bahrain is sovereign over all of the features situated between the coast of the main island of Bahrain and the coast of Qatar, and the single maritime boundary between Bahrain and Qatar must be delimited on the basis of, and taking into account, Bahrain's sovereignty. The approach suggested by Qatar runs counter to the principles and rules of international law.
- (e) The boundary which Qatar claims in the southern sector northwards of the point L fails to take into account Bahrain's sovereignty over the Zubarah Region.

SECTION 8.3 The northern sector

608. As shown above,⁷⁹³ Qatar's Memorial engages in continual equivocation *à propos* the location of the division between the two sectors. Sometimes this division is stated to be at the point where the Parties' coasts cease to be opposite coasts, *i.e.*, at a latitude of approximately 26°10'20"N, while sometimes the division is stated to be at the point BLV, which is the northernmost point of the British 1947 line, at a latitude of 26°33'35"N.

609. Qatar has no justification for its attempt to situate the division between the two sectors at the point BLV. The point BLV has no geographical or other basis. It is totally arbitrary. Its sole explanation is that it happens to be situated on the line suggested half a century ago by the British authorities for the division of the seabed, and in fact is the northern terminus of that line. In no way can the point BLV constitute the basis for the division between the southern and the northern sector for delimitation purposes. The division between the two sectors lies where the coastal relationship ceases to be a relationship of opposite coasts,⁷⁹⁴ *i.e.*, at a latitude of approximately 26°10' to 26°20"N.

A. The coastal relationship in the northern sector

610. The Parties' respective positions as to the geographical relationship between the coasts in the northern sector are not very different. Bahrain's Memorial notes that in the northern sector the delimitation is "between adjacent, rather than opposite coasts."⁷⁹⁵ Qatar observes that this part of the area to be delimited is "lying completely outside the area where Qatar and Bahrain have directly facing coasts, *i.e.*, beyond the imaginary line

⁷⁹³ See *supra*, paras. 593 *et seq.*

⁷⁹⁴ Qatar sometimes accepts this approach (QM paras. 11.2, 12.10)

⁷⁹⁵ BM para. 635.

from [Ra's Rakan] to [Muharraq], without however corresponding to the situation of two adjacent States."⁷⁹⁶ To the north of the imaginary line separating the two sectors, the delimitation is to be effected, as Qatar correctly states, "in the open sea."⁷⁹⁷ Bahrain agrees with Qatar that "it is unnecessary to make a legal characterisation of the geographical situation in the northern sector", because the principles and rules of international law do not differ substantially as between one case and the other, and the distinction "has no direct legal effect."⁷⁹⁸ However the situation in the northern sector is characterised, the applicable rule is the customary rule of equitable principles-relevant circumstances, which has the same content and methodology as the equidistance-special circumstances rule applicable to the territorial sea delimitation in the southern sector.⁷⁹⁹ In both cases, the process of delimitation starts with a provisional equidistance line between the international legal baselines of the parties, which is then adjusted if the relevant circumstances so require.

B. The legally relevant circumstances in the northern sector

611. Qatar is correct in referring to the issue as one of "legally relevant circumstances."⁸⁰⁰ Not every circumstance is legally relevant.⁸⁰¹ Some are, others not.

⁷⁹⁶ QM paras. 12.10 and 12.59.

⁷⁹⁷ *Ibid.* This analysis is reminiscent of the analysis made by a Chamber of the Court in the Gulf of Maine case *à propos* the segment of the maritime boundary which was to be delimited "in the outer area", *i.e.* beyond the line Nantucket/Cape Sable, which the parties both considered as the closing line of the Gulf of Maine: the Court noted that "this portion of the line ... will ... be situated in the open ocean." (Delimitation of the Maritime Boundary in the Gulf of Maine Area, I.C.J. Reports 1984, p. 337, para. 224). One is also reminded of the Anglo-French case, where both the parties and the award of the Tribunal distinguished between the delimitation "in the Channel" and the delimitation "in the Atlantic Region". (U.N., RIAA, Vol. XVIII, p. 58, para. 103, and p. 96, para. 204).

⁷⁹⁸ QM para. 12.11.

⁷⁹⁹ See QM paras. 11.41, 12.14, 12.16.

⁸⁰⁰ QM para. 12.22.

⁸⁰¹ Continental Shelf (Libya/Malta), I.C.J. Reports 1985, p. 40, para. 48. See Maritime Delimitation in the Area between Greenland and Jan Mayen, I.C.J. Reports 1993, p. 63-64, paras. 57-58.

612. Some of the circumstances which Qatar invokes as being legally relevant undoubtedly may be so. For example, Bahrain agrees with Qatar that delimitation agreements with third States, and in particular the Bahrain/Iran and Iran/Qatar Agreements, may be legally relevant circumstances.⁸⁰²

613. Bahrain also agrees with Qatar's view that a maritime delimitation should always take into account the geographical configuration of the Parties' respective coasts.⁸⁰³ But Bahrain finds Qatar's application of this principle completely unacceptable. Qatar asserts that "a quick glance at the geographical configuration of the coastlines of Qatar and Bahrain is sufficient to show" that neither coastline has "deep indentations or irregularities, pronounced deviations or distortions, or major anomalies", and that neither coastline has "pronounced concave or convex features", or "sharply defined receding coasts or coastal projections". Qatar goes on to argue that the two coasts are characterised by their regularity, their "ordinariness", and their "normality",⁸⁰⁴ and hence that there is no need to take into account "any irregularity in the general direction of the coastlines of Qatar and Bahrain." A "quick glance" at the map shows exactly the contrary. Bahrain does not consist simply of its main island, but is geographically and politically, in addition to the Zubarah Region, an archipelago, a system of spatially proximate and economically interrelated islands and other relevant features, whose aggregate coast is a complex construct of lines. Bahrain's eastern maritime façade is no less complex than the coastal façade with which the Court was confronted in the Fisheries case.

614. Bahrain also agrees with Qatar's proposition that a significant disparity or disproportion between the relevant coastal lengths of the Parties may be taken into

⁸⁰² QM paras. 12.37 *et seq.*; BM para. 651.

⁸⁰³ QM para. 12.26.

⁸⁰⁴ QM para. 12.27-12.29.

account as a relevant circumstance.⁸⁰⁵ Here again, however, Qatar's application of this principle is unacceptable. Qatar measures the length of Bahrain's coastal façade on the basis of Qatar's position that "no account will be taken either of islands and islets or of low-tide elevations",⁸⁰⁶ and thereby postulates a fictitious and artificial coastal façade for Bahrain, which, according to Qatar, measures just 55.5 kilometres (29.9 nautical miles) in length.⁸⁰⁷ Here again, Qatar creates a caricature of Bahrain's coastline by arbitrarily excluding from the computation the coasts of the islands and other legally relevant features of Bahrain. It may be recalled that in the Guinea/Guinea-Bissau case, where it had been proposed that the Bijagos Islands not be counted in the computation of the coastal lengths, the Tribunal said

"If the Bijagos Islands were not taken into account, the coastline of Guinea-Bissau would be only 128 miles long. This State's coastline is therefore affected by a coefficient of 20%, which equitably brings out the importance of the islands in this case...."⁸⁰⁸

615. In addition, even if there were a disparity between Bahrain's and Qatar's respective coastal lengths, it is difficult to see how such a disparity would be relevant to the delimitation in the northern sector, which does not lie off these coasts and is geographically quite distant from them. The geographical configuration of the Parties' coasts in the southern sector can by no means be held out as a relevant circumstance for the delimitation in the northern sector, which is situated, as Qatar rightly points out, "in the open sea".⁸⁰⁹ It is appropriate to recall how the Tribunal in the Anglo-French case reacted to France's suggestion that the delimitation in the Atlantic Region should be

⁸⁰⁵ QM paras. 12.30 *et seq.*

⁸⁰⁶ QM para. 12.31.

⁸⁰⁷ QM para. 12.32.

⁸⁰⁸ Delimitation of the Maritime Boundaries between Guinea and Guinea-Bissau, U.N. RIAA, Vol. XIX, p. 185, para. 97. (English version from ILR, Vol. 77, p. 679.)

⁸⁰⁹ QM paras. 12.10 and 12.59.

effected by drawing a median line by reference to the prolongation of the general directions of the coasts of the parties in the Channel, an area geographically distinct from the Atlantic Region. The Tribunal held that this suggestion

"... detaches the delimitation almost completely from the coasts which actually abut on ... the Atlantic region."⁸¹⁰

As explained earlier, the rationale for treating areas in dispute as separate sectors is that they are so geographically different that to treat them as a unit would lead to an inequitable result. Qatar cannot at one and the same time agree that the sectors are to be treated separately and "reach over" from one to the other sector in order to find and then import convenient features which might influence the delimitation in an area to which they are alien.

616. Finally, Qatar cites "the geological and geomorphological unity of the sea-bed area"⁸¹¹ as a legally relevant circumstance for the delimitation of the northern sector. The Court has held in the Libya/Malta case that "to ascribe a role to geophysical or geological factors" in the delimitation of the continental shelf would amount to "allot[ting] those factors a place which now belongs to the past."⁸¹² Since geological and geomorphological factors have ceased to be relevant for the purposes of continental shelf delimitations, Qatar's assertion that such factors are relevant for the purpose of delimiting an all-purpose single maritime boundary is certainly inconsistent with the contemporary principles of law which Qatar agrees are to be applied in the instant case.

617. It is indeed difficult to understand why Qatar takes the trouble to list and analyse the "legally relevant circumstances". No sooner has Qatar compiled its list than it proceeds to claim a boundary which takes no account of the circumstances it has

⁸¹⁰ U.N., RIAA, Vol. XVIII, p. 115, para. 246.

⁸¹¹ QM paras. 12.23 *et seq.*

⁸¹² Continental Shelf (Libya/Malta), I.C.J. Reports 1985, p. 36, para. 40.

enumerated. The function of relevant circumstances (or factors) in the customary law of maritime delimitation is to provide a basis for an adjustment or shift of the provisional equidistance line, if, in view of the circumstances (or factors), such an adjustment or shift appears necessary in order to bring about an equitable result. But Qatar's proposed method of delimitation in the northern sector does not at all consist of starting with an equidistance line and then adjusting or shifting this line in the light of legally relevant circumstances in order to arrive at an equitable result. To the contrary, Qatar proposes to take the British 1947 line as it is, up to its terminus at the point BLV. Qatar then proposes to draw from this point a line perpendicular to the line Ra's Rakan/Muharraq, disregarding the segment of this perpendicular to the south of the point BLV and conserving only the segment which is situated to the north of the point BLV. Finally, Qatar proposes to rotate this segment from west to east. Having correctly described the principles of the method of delimitation, Qatar ignores what it has written and proceeds to draw a line that is oblivious to these principles.

618. In its enumeration of the relevant circumstances, Qatar fails to mention the presence of Bahrain's pearling banks. Elsewhere in its Memorial, Qatar argues "the irrelevance of pearl fishing for the purpose of maritime delimitation in the present case."⁸¹³ Qatar invokes two factual arguments and one legal argument in support of this proposition.⁸¹⁴

619. Qatar's factual arguments are to the effect that "rights in pearl fisheries in the Gulf were the collective property of all tribes living in the Gulf", and that "Qatar also had a role – even if less important than that of Bahrain – in the exploitation of pearl fisheries." These arguments are misleading and irrelevant.

⁸¹³ QM paras. 9.15 and 10.39-10.40.

⁸¹⁴ These arguments are developed in Appendix 4 of Qatar's Memorial. QM Appendix 4, Vol. 15, pp. 113 *et seq.*

620. Qatar's first factual argument – that "rights in pearl fisheries in the Gulf were the collective property of all tribes living in the Gulf" – amounts to an assertion that neither Bahrain nor any other State exercised exclusive jurisdiction over any pearl fishery in the Gulf, and a conclusion therefrom that every pearl fishery was owned in common by all Gulf tribes.

621. Qatar's implied assertion that neither Bahrain nor any other State exercised exclusive jurisdiction over any pearl fishery in the Gulf is true in relation to Bahrain to the extent that Bahrain has never attempted to exclude foreign fishing vessels entirely from any of its pearling banks, but false to the extent that it implies that Bahrain did not purport to regulate the activities of foreign fishing vessels at these banks. The regulations imposed by the Ruler of Bahrain, for example, in relation to the opening and closing of the diving season, or prohibiting the use of artificial diving apparatus, were strictly applied to and observed by all including foreigners. Again, any loss of life or damage to property which occurred at Bahrain's pearling banks would, regardless of the nationalities of the persons concerned, be dealt with by the Government of Bahrain.⁸¹⁵

622. It follows that Qatar's conclusion that every pearl fishery was owned in common by all Gulf tribes is incorrect.

623. Qatar's second factual argument – that "Qatar also had a role – even if less important than that of Bahrain – in the exploitation of pearl fisheries" – is spurious. It is based on an unwritten assumption that Bahrain's claim relates to the entirety of the pearl fisheries in the Gulf and sidesteps, by a kind of verbal sleight-of-hand, the question of which pearl fisheries Bahrain and Qatar exploited respectively.

624. Bahrain does not deny that Qatar has had a role in the exploitation of pearl fisheries, or even that there are pearling banks which might be said to belong to Qatar in

⁸¹⁵ See the statement of Jabor Mussallam dated 26 October 1950, p. 2. BM Ann. 349, Vol. 6, p. 1503 and QM Ann. IV.254, Vol. 12, p. 45.

the same sense in which the pearling banks claimed by Bahrain can be said to belong to Bahrain. The essential point is that Qatar's role in the exploitation of the pearling banks claimed by Bahrain was very inferior to that of Bahrain, and indeed was almost non-existent.⁸¹⁶ Qatar's crude attempt to evade the debate on this point is an admission that Qatar is unable to produce evidence of Qatari activity in relation to Bahrain's pearling banks which competes in any serious respect with the evidence of Bahraini activity which Bahrain has put forward.

625. Qatar's legal argument is to the effect that the exploitation of pearling banks does not confer on the exploiting State a right over the continental shelf where the banks are situated but that, to the contrary, it is the right over the continental shelf which confers on the State the right to exploit the pearling banks. This argument misrepresents Bahrain's position. Bahrain does not argue that an entitlement to the continental shelf derives from the exploitation of pearling banks situated on this shelf. Rather, Bahrain submits that the presence of pearling banks which have traditionally been exploited by its citizens, under its jurisdiction and control, constitutes a legally relevant circumstance which must be taken into account when the Court arrives at the stage of determining "the relative weight to be accorded to different considerations."⁸¹⁷ In the Jan Mayen case, the Court explicitly addressed "the question whether access to the resources of the area of the overlapping claims constitutes a factor relevant to the delimitation." The Court replied to this question in the affirmative, recalling that, in regard to the continental shelf, it had previously declared that "[t]hose resources are the essential objective envisaged by States when they put forward claims to sea-bed areas containing them."⁸¹⁸ This consideration led the Court in the Jan Mayen case to consider

⁸¹⁶ *Ibid.*

⁸¹⁷ Maritime Delimitation in the Area between Greenland and Jan Mayen, I.C.J. Reports 1993, p. 63, para. 58.

⁸¹⁸ *Op. cit.*, p. 70, para. 72.

as a legally relevant factor "the equitable access to fishery resources".⁸¹⁹ Qatar recognises that "sedentary fisheries – a category to which pearl fishing undoubtedly belongs – are considered as resources of the continental shelf."⁸²⁰ The control and jurisdiction traditionally exercised by Bahrain over certain pearling banks in the northern sector, together with the traditional exploitation of these pearling banks by Bahrain's citizens and vessels, constitutes a relevant circumstance which may affect the position of the boundary line. This, precisely, is the argument on which Bahrain bases its request that the provisional equidistance line in the northern sector be shifted so as to take this factor into account.⁸²¹

626. In the light of these general considerations, Bahrain will now proceed to analyse critically the delimitation method claimed by Qatar in the northern sector. In this respect, it is necessary to distinguish the segment of the boundary claimed by Qatar situated to the south of the point BLV and the segment of this boundary situated to the north of BLV.

C. The segment of the single maritime boundary requested by Qatar to the south of point BLV, i.e., from the so-called closing line northwards to point BLV

627. Qatar states that "Up to the turning point of BLV, the boundary corresponds to the line laid down by the 1947 decision."⁸²² The defects in this method, which consists of simply taking the 1947 line which Qatar acknowledges not to be a binding maritime boundary, as the single maritime boundary, without demonstrating that such a line is required by the application of contemporary equitable principles, have been

⁸¹⁹ *Op. cit.*, p. 71, para. 75.

⁸²⁰ QM para. 10.40; Appendix 4, para. 24.

⁸²¹ BM paras. 638 and 653.

⁸²² QM para. 12.62.

demonstrated above.⁸²³ They need not be repeated in detail here. These defects are even more glaring in the northern than in the southern sector. The points NSLB and BLV bear no relationship whatever to the coastal geography. The only basis which Qatar has been able to find for these points is that they were "probably" chosen in order to facilitate maritime access to Bahrain. In short, as noted above,⁸²⁴ the segment of the boundary claimed by Qatar to the south of BLV has no known *raison d'être*, justification or explanation. In proposing this segment, Qatar acts in contradiction to the principles and rules of maritime delimitation which the Court has laid down, and which Qatar's Memorial itself recalls.

D. The segment of the single maritime boundary requested by Qatar to the north of point BLV

(i) The delimitation method proposed by Qatar

628. The segment of Qatar's claimed maritime boundary situated to the north of the point BLV is even more unjustifiable. If Bahrain has correctly understood Qatar's Memorial in this respect, Qatar requests that the Court adopt the following process of delimitation:

- (a) The starting point of Qatar's proposed delimitation process is that "[t]he single maritime boundary ... in the northern sector must necessarily pass through point BLV."⁸²⁵ Why? Because – so Qatar says – this is the "terminal point" of the 1947 line, and "there is no other objective factor in this part of the delimitation area which could be taken into consideration."⁸²⁶

⁸²³ See *supra*, paras. 552 *et seq.*

⁸²⁴ See *supra*, paras. 606 *et seq.*

⁸²⁵ QM para. 12.62.

⁸²⁶ QM para. 11.42.

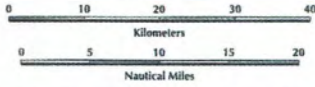
- (b) Once this "anchor point" has been chosen, Qatar's proposed method consists of drawing through the point BLV a perpendicular to the "closing line" Ra's Rakan/Muharraq. This produces the line R/BLV/S on Map N° 20 of Qatar's Memorial, reproduced here as Map 7.
- (c) The line R/BLV/S, which is perpendicular to the "closing line" and passes through the "anchor point" BLV, nevertheless is not, as such, the boundary claimed by Qatar in the northern sector. To become Qatar's claimed boundary, the perpendicular R/BLV/S must undergo two transformations.
- (d) Transformation n° 1: between the point R, situated on the "closing line", and the point BLV, the perpendicular is reduced to a dotted line, fading away, in some mysterious fashion, so as to give place to the corresponding segment of the British 1947 line, which lies further to the west (passing through NSLB) and is, therefore, more favourable to Qatar. Between the points R and BLV, in other words, the perpendicular vaunted by Qatar as being "very well suited to the geography of the area"⁸²⁷ is set aside in favour of the 1947 line, which is manifestly not based upon perpendicularity. "[T]he boundary must be drawn in accordance with the perpendicularity method",⁸²⁸ so Qatar asserts, but the boundary claimed by Qatar to the south of BLV is in fact the 1947 line, which is not at all a perpendicular.
- (e) Transformation n° 2: in the light of the fact that the intersection of Qatar's perpendicular with the continental shelf boundary agreed in the Bahrain/Iran Agreement of 1971 – *i.e.*, point S on Qatar's Map N° 20 – turns out to be situated 1,271.97 metres to the west of point 2 of the Bahrain/Iran Agreement, which under the Bahrain/Iran Agreement is the westernmost possible location for the

⁸²⁷ QM para. 12.43.

⁸²⁸ QM para. 12.62.

APPLICATION OF THE STRICT PERPENDICULARITY METHOD IN THE NORTHERN SECTOR

Mercator Projection
Scale: 1:695,000
accurate at 26°N latitude



Compiled from: DMA Nautical Charts Nos. 62420, 62530, 62550 and BA Nautical Chart 2886.
Prepared by: Maryland Cartographics, 1996.

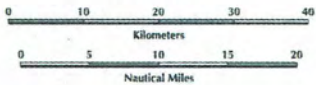


Map 7 : MAP N° 20 OF QATAR'S MEMORIAL

Specially prepared for presentation to the International Court of Justice.

APPLICATION OF MODIFIED PERPENDICULARITY IN THE NORTHERN SECTOR

Mercator Projection
Scale: 1:695,000
accurate at 26° N latitude



Compiled from: DMA Nautical Charts Nos. 62420, 62530, 62350 and BA Nautical Chart 2886.
Prepared by: Maryland Cartographics, 1996.



Map 8 : MAP N° 21 OF QATAR'S MEMORIAL

Specially prepared for presentation to the International Court of Justice.

eastern terminus of the Bahrain/Iran continental shelf boundary, Qatar proposes "for the sake of simplicity" to rotate the line R/S of its Map N° 20 towards the east, so as to make its northern terminal point coincide with point 2 of the Bahrain/Iran continental shelf boundary.⁸²⁹ As a consequence of this rotation, the segment of the perpendicular which is situated to the south of BLV (shown as a dotted line on Qatar's Map N° 20) is no longer aligned with the segment which is situated to the north of BLV. In order to reconstitute a straight line and, hence, avoid creating an angle at the point BLV, Qatar proposes to slide the point R of its Map N° 20 by 822.24 metres towards the west, so as to become the point T of Qatar's Map N° 21. Nevertheless, the corrected segment T/BLV is also shown as a dotted, and therefore fictitious, line, because south of the point BLV Qatar continues to claim the relevant segment of the 1947 line as the maritime boundary, rather than either the original or the corrected perpendicular. The line R/BLV/S, and the so-called "modified perpendicular" line T/BLV/2, are shown on Map N° 21 of Qatar's Memorial, reproduced here as Map 8.

(f) The scope and effect of these two transformations are shown on Map 9.

(ii) The perpendicularity method

629. Qatar's Memorial dwells on the merits of the perpendicularity method. According to Qatar, the major advantage of this method is that it "is derived from the same rationale as the equidistance method. In fact it is only a variant of that method."⁸³⁰ This is correct, so far as it goes. For territorial sea delimitations between adjacent coasts, the perpendicular to the coastal direction at the intersection of the land boundary

⁸²⁹ It may be noted that point 2 is described by Qatar as "a very significant reference point... because it is the Qatar/Iran/Bahrain tripoint" (QM para. 12.72). Qatar, however, states elsewhere in its Memorial, quite rightly, that "the Court has no jurisdiction to determine the Qatar/Iran/Bahrain tripoint without the express consent of Iran." (QM para. 12.42; see also QM para. 12.64, fn. 154.)

⁸³⁰ QM para. 12.44.

with the coast has indeed found favour as a delimitation method in the past, because it permitted the equal division of the area of overlap; it was perceived to have the same advantage as the median line between opposite coasts. As a Chamber of the Court was to observe in the Gulf of Maine case:

"[t]he method of the perpendicular was probably the oldest method to come to mind when problems arose in the delimitation by adjacent States of their territorial sea."⁸³¹

Gidel saw in the perpendicularity method, as Münch had seen before him:

"une modalité spéciale de la ligne médiane entendue au sens large [a specific application of the median line as broadly understood]."⁸³²

The perpendicular between adjacent coasts and the median line between opposite coasts were envisaged, not as divergent methods, but as variants of a single method. Gidel thus noted:

"[la] [f]aveur généralement rencontrée en pratique et en doctrine par la solution de la ligne médiane perpendiculaire à la direction générale de la côte [the favour which the median line perpendicular to the general direction of the coast has generally received in practice and in scholarly commentary]",

and added that:

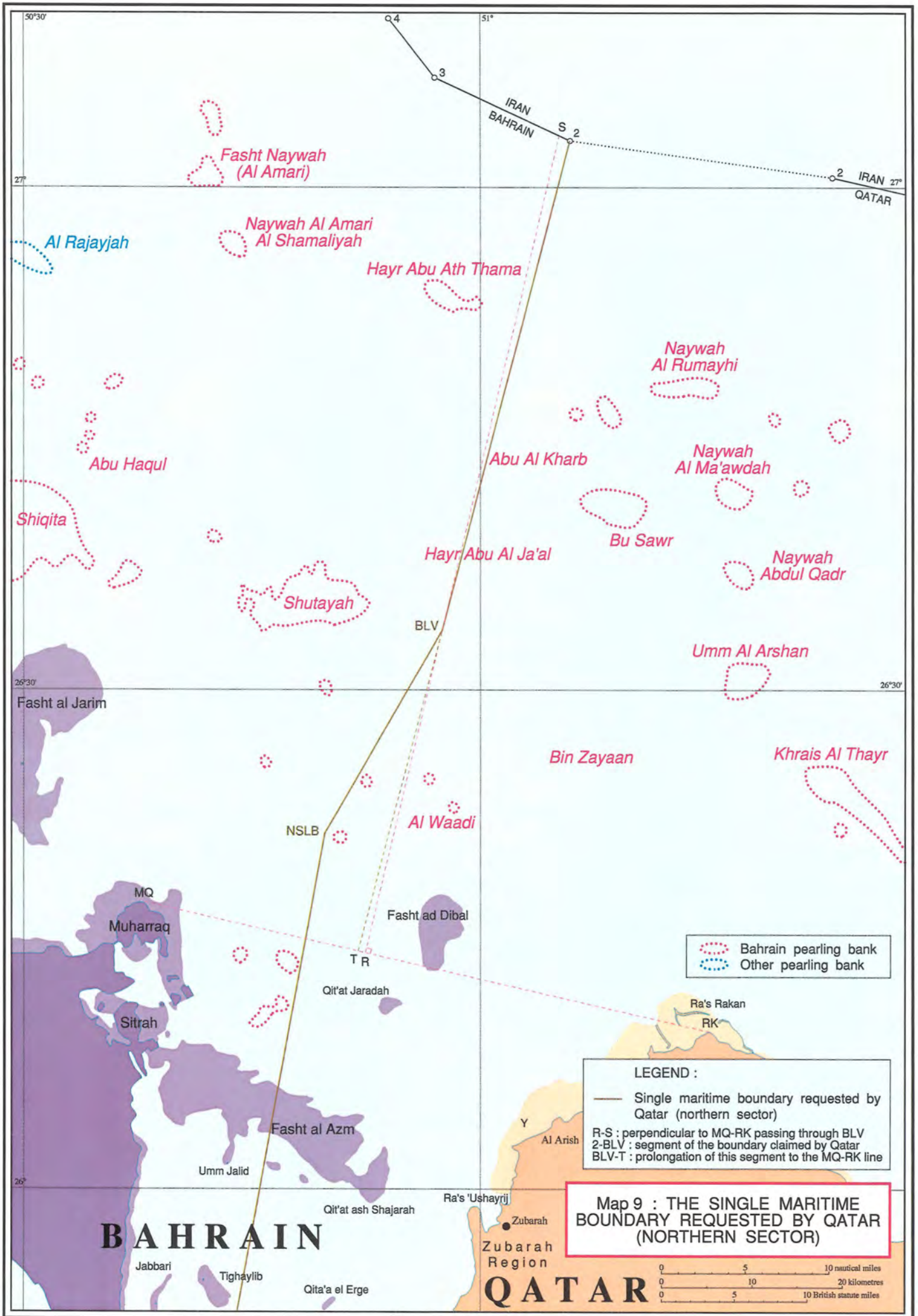
"la solution de la ligne médiane ou perpendiculaire a reçu un certain nombre d'applications positives [the solution of the median or perpendicular line has been applied in practice on a number of occasions]."⁸³³

630. What Qatar's Memorial omits to state, however, is that it became rapidly apparent that the perpendicularity method is too crude to attain the desired objective of

⁸³¹ I.C.J. Reports 1984, p. 320, para. 175.

⁸³² G. Gidel, Le droit international public de la mer, Paris, Sirey, 1932-1934, Vol. III, p. 769. See E. Münch, Die Technischen Fragen des Küstenmeers, Kiel, 1934, p. 156.

⁸³³ *Op. cit.*, pp. 768-769.



an equal division of the maritime zones whenever the coast is not rectilinear and it is, accordingly, difficult to identify its general direction. This desired objective can only be attained in the case of perfectly rectilinear coasts, which do not occur often in nature. In the real world, coasts are not often perfectly straight. Hence the acute problem of defining the general direction of the coast. As the Special Adviser on Geography of the United States Department of State, S.W. Boggs, pointed out, the perpendicularity method

"... is open to criticism because it is not always feasible to determine the general trend of the coast: how much coast should be taken into consideration for this purpose – a distance of three miles on each side of the land boundary, or five miles, or twenty miles?"⁸³⁴

631. Qatar's Memorial also omits to state that, owing particularly to the writings of Boggs,⁸³⁵ the more scientifically developed equidistance method has progressively come to replace the comparatively primitive perpendicularity method. As an example of this tendency, the Committee of Experts consulted by the International Law Commission in 1953 – of which Boggs was a member – noted that in many instances it is impracticable to establish any "general direction of the coast" and that the result would depend on the scale of the chart used for the purpose and the somewhat arbitrary decision as to how much coastline should be utilised in attempting to determine any "general direction of the coast". The Committee of Experts therefore ruled out the perpendicularity method and recommended the use of the equidistance method, *i.e.*, drawing a line every point of which is equidistant from the two coasts, for both territorial sea and continental shelf delimitations, between opposite as well as adjacent coasts.⁸³⁶ As Professor François,

⁸³⁴ S.W. Boggs, "Problems of Water-Boundary Definition: Median Lines and International Boundaries Through Territorial Waters", Geographical Review, Vol. 27, 1937, p. 454.

⁸³⁵ *Op. cit.*, pp. 447 *et seq.* See also International Boundaries. A Study of Boundary Functions and Problems, New York, Columbia University Press, 1940, pp. 178 *et seq.*; "Delimitation of Seaward Areas under National Jurisdiction", American Journal of International Law, Vol. 45, 1951, pp. 239 *et seq.*

⁸³⁶ Yearbook of the International Law Commission 1953, Vol. II, p. 77.

Rapporteur spécial to the International Law Commission, was to note the following year:

"la méthode de la ligne tirée perpendiculairement à la direction générale de la côte manque de précision juridique [the method of drawing a line perpendicular to the general direction of the coast is not legally precise]."⁸³⁷

The Commission supported the proposals of the Committee of Experts.⁸³⁸

632. The equidistance method is, therefore, a scientifically more developed and refined version of the perpendicularity method. In fact, the technique of the equidistance method incorporates that of the perpendicularity method. Since the line of equidistance between two points is by definition the perpendicular bisector of the line joining the two points, an equidistance line is, in the final analysis, nothing other than a succession of perpendiculars. The disadvantages inherent to the strict perpendicularity method have, nevertheless, discouraged its use, in State practice and in international jurisprudence, except in the rare geographical situations where that method and the equidistance method are interchangeable, particularly where the delimitation is between virtually rectilinear coasts or seawards of a bay the imaginary closing line of which is, by definition, perfectly rectilinear. Qatar recognises that the perpendicularity method has been employed in State practice and international jurisprudence in these "two geographical contexts".⁸³⁹ Qatar fails, however, to state that it is only in these two exceptional situations, where it is identical with the equidistance method, that the perpendicularity method has been used, and that it has been abandoned for all other situations.

⁸³⁷ *Op. cit.*, 1954, Vol. II, p. 6.

⁸³⁸ *Op. cit.*, 1956, Vol. II, p. 272.

⁸³⁹ QM para. 12.48.

(iii) The perpendicular to the general direction of the coast

633. It is difficult to understand why Qatar considers it useful to dwell on the use of a perpendicular to the general direction of the coast.⁸⁴⁰ Qatar obviously does not purport to justify its use of a perpendicular in the northern sector on this basis, but rather on the basis that a perpendicular in the northern sector is analogous to a perpendicular to the closing line of a bay or estuary.

634. Moreover, in several of the examples of State practice cited by Qatar, the perpendicularity method was employed precisely because the result to which it led was exactly the same as the result which the equidistance method would have produced. Thus, the 1958 agreement effecting a territorial sea delimitation between Poland and the USSR in the Gulf of Gdansk defines the delimitation line as "a line perpendicular to the shoreline at the terminal point of the Polish-Soviet State frontier". But, as Eric Frankx notes in his commentary: "The method used to determine the turning and terminal points was strictly equidistance."⁸⁴¹ So also the Brazil/Uruguay Agreement of 1972.⁸⁴² Although it defines the maritime boundary between the respective countries as "a line running ... in a direction nearly perpendicular to the general line of the coast," the analysis in Limits in the Seas (N° 73) notes that it was first agreed by the two Governments to delimit their boundary "in accordance with equidistance" and, as Eduardo Jiménez de Aréchaga has observed in his commentary, the perpendicular agreed upon "achieved substantially the same result" as an equidistance line.⁸⁴³ As for the Costa Rica/Panama Agreement of 1980, it defines the maritime boundary as:

⁸⁴⁰ QM para. 12.48.

⁸⁴¹ J.I. Charney and L.M. Alexander (eds.), *op. cit.*, Vol. II, pp. 2039 *et seq.*, at p. 2045.

⁸⁴² *Op. cit.*, Vol. I, pp. 785 *et seq.*

⁸⁴³ Charney and Alexander, *op. cit.*, Vol. I, p. 786.

"the median line every point of which is equidistant from the nearest points of the baselines from which the breadth of the territorial sea of each State is measured".⁸⁴⁴

This boundary, the commentary in Limits in the Seas (N° 97) remarks:

"may be said to be akin to a perpendicular to the general direction of the coastline measured in the area of the land boundary terminus."

635. As to the jurisprudence cited by Qatar, the arbitral award of 1909 in the Grisbadarna case was decided at a time when the technique of equidistance was unknown; it is therefore of no precedential value in this regard. In the Tunisia/Libya case, the Court drew a perpendicular to the coastline for a short segment of the boundary only, close to the coast, because, as it noted:

"a line drawn perpendicular to the coast becomes, generally speaking, the less suitable as a line of delimitation the further it extends from the coast."⁸⁴⁵

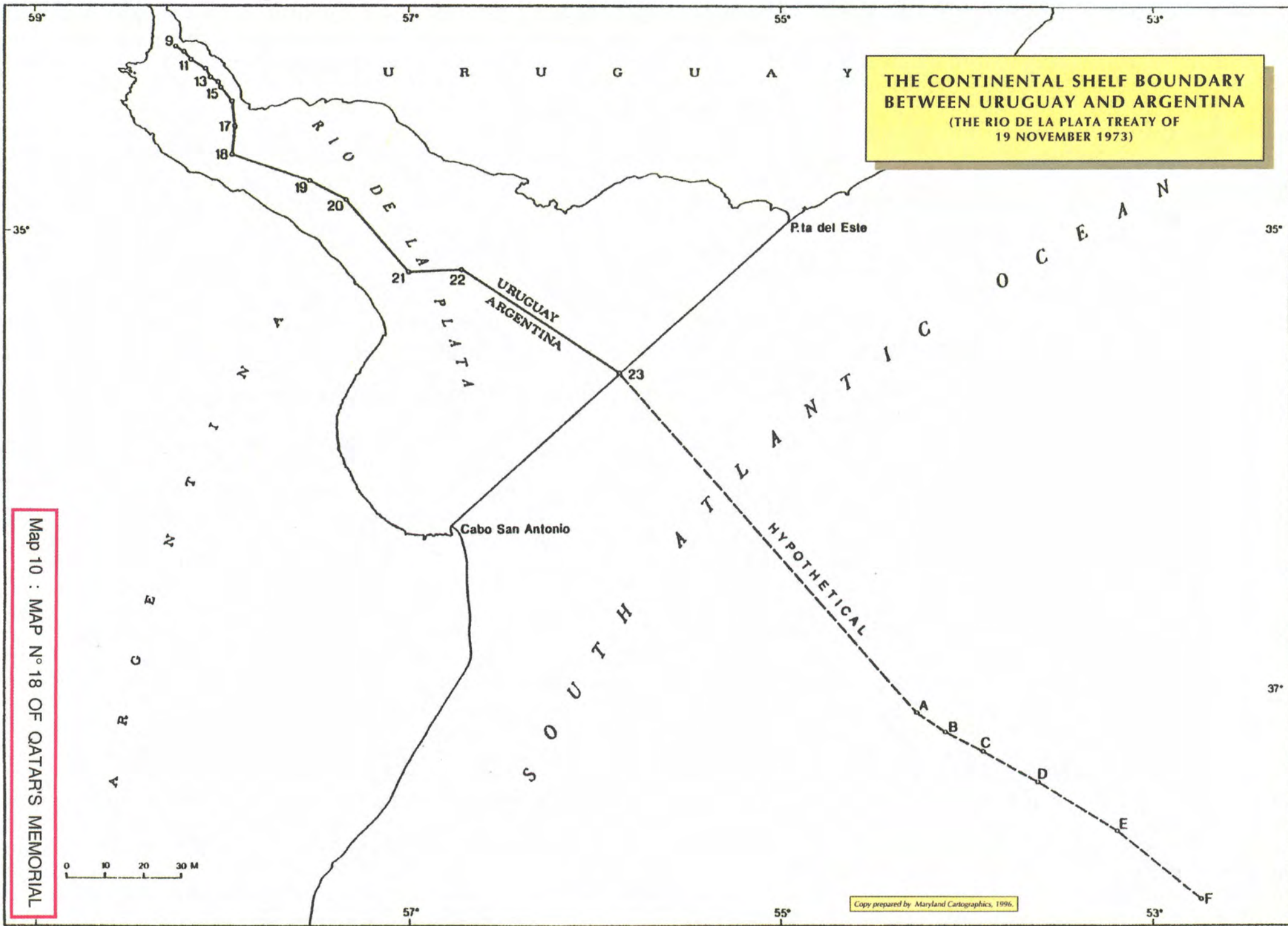
It might be added that, as with the boundary in the Grisbadarna award, the origin of the line in Tunisia/Libya predated the development of modern methods of delimitation. In the final analysis, the only precedent worthy of the name is the arbitral award in the Guinea/Guinea-Bissau case, where the Tribunal used a perpendicular to a line representing the general direction of the coasts over a distance of 800 kilometres, crossing the land territory of the two States for nearly 350 kilometres, in some places nearly 70 kilometres inland. This was surely an exceptional case.

(iv) The perpendicular to the closing line of a coastal concavity

636. In its attempt to give credence to the delimitation method which it proposes in the northern sector, Qatar does not in fact rely on the precedents employing a perpendicular to the general direction of the coasts, but on those which employ a

⁸⁴⁴ Charney and Alexander, *op. cit.*, pp. 537 *et seq.*, at p. 543.

⁸⁴⁵ I.C.J. Reports 1982, pp. 87-88, para. 125.



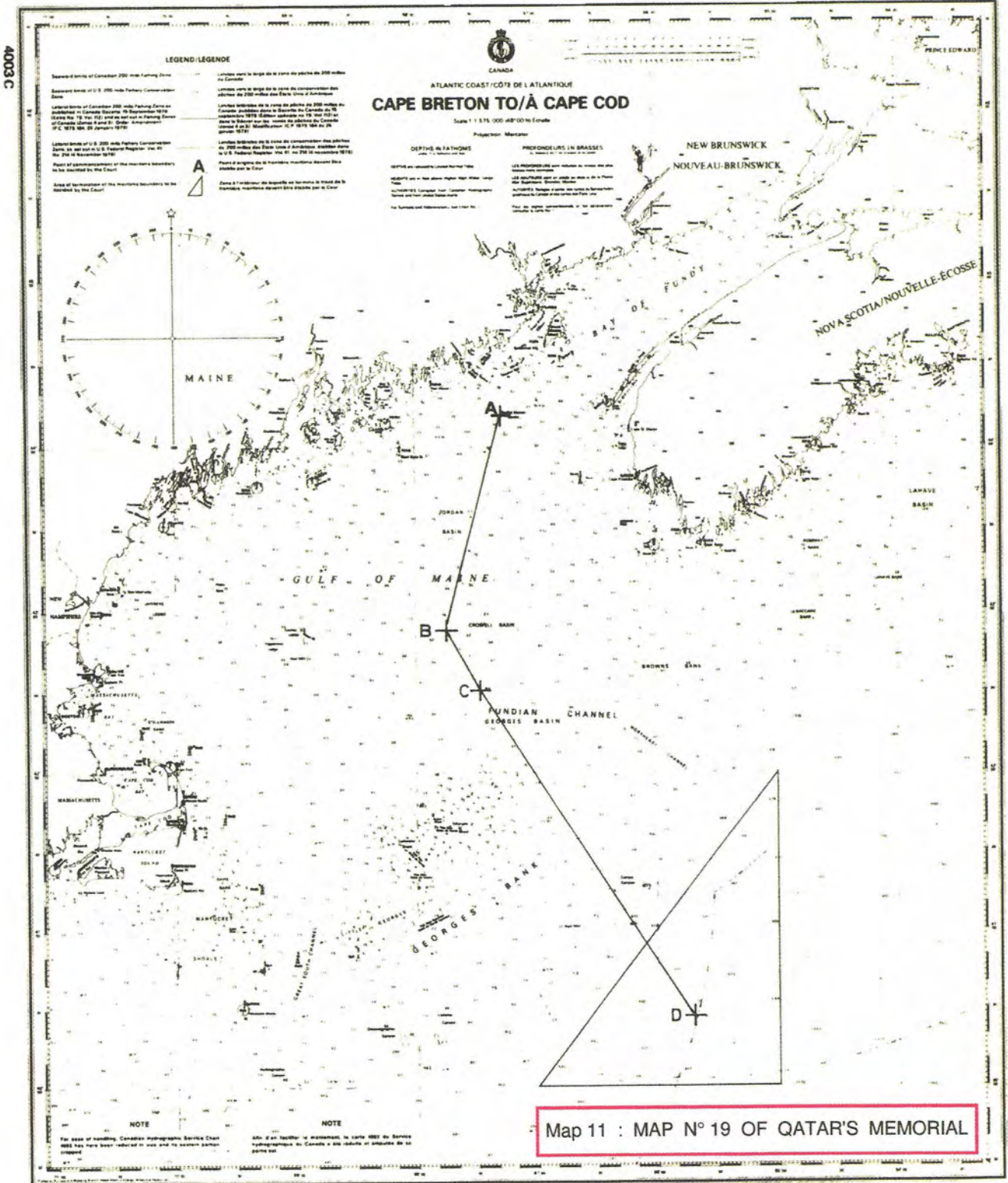
**THE CONTINENTAL SHELF BOUNDARY
BETWEEN URUGUAY AND ARGENTINA**
(THE RIO DE LA PLATA TREATY OF
19 NOVEMBER 1973)

Map 10 : MAP N° 18 OF QATAR'S MEMORIAL

Copy prepared by Maryland Cartographics, 1996.

**THE MARITIME BOUNDARY BETWEEN
CANADA AND THE UNITED STATES
(THE JUDGMENT OF 12 OCTOBER 1984
IN THE GULF OF MAINE CASE)**

Copy prepared by Maryland Cartographics, 1996.



perpendicular to the closing line of a coastal concavity. Two such precedents are cited by Qatar. One precedent, the Treaty of Rio de la Plata of 1973 between Argentina and Uruguay, is an example drawn from State practice; the other is the judgment of a Chamber of the Court in the Gulf of Maine case.

637. It is difficult to see what assistance Qatar hopes to derive from the Treaty of Rio de la Plata.⁸⁴⁶ Article 70 of this Treaty explicitly defines the maritime boundary, beyond the imaginary closing line of the Rio which joins Punta del Este (Uruguay) and Punta Rasa del Cabo San Antonio (Argentina), as a line equidistant between these two points. Qatar correctly observes that this line could just as well have been defined as a perpendicular to the closing line of the Rio drawn from the midpoint of that closing line. What this precedent demonstrates is that in a situation characterised by a perfectly regular coastline (be it real, or, as in the case of the Treaty, imaginary), the equidistance and perpendicularity methods lead to the same result – which no one denies. This precedent gives no support to the proposition that the perpendicularity method is to be preferred, since, to the contrary, the parties to the Treaty referred explicitly to the equidistance method to define the boundary which they agreed to delimit.

638. In the Gulf of Maine case, the maritime boundary in the outer area, *i.e.*, in the area beyond the closing line of the Gulf (which, as the two parties agreed, ran from Nantucket Island to Cape Sable), was defined by the Chamber as a perpendicular to this closing line commencing at the intersection of the previous segment with the closing line. Given that the previous segment consisted of a median line between opposite coasts which was shifted towards the east, the starting point for the perpendicular was not situated at the midpoint of the closing line, but was also displaced towards the east.⁸⁴⁷ Therefore, in the words of Professor Weil (quoted by Qatar), the perpendicular

⁸⁴⁶ QM paras. 12.50 *et seq.* See Map N° 18 of Qatar's Memorial, reproduced here as Map 10.

⁸⁴⁷ I.C.J. Reports 1984, pp.336-337, para. 222-224. See Map N° 19 of Qatar's Memorial, reproduced here as Map 11.

in the areas outside the Gulf was "the equivalent of an equidistance line controlled by two points at the far ends of the closing line and shifted eastwards."⁸⁴⁸

639. From these two precedents, Qatar concludes that in certain geographical conditions "the perpendicularity method allows a reasonable and equitable delimitation of maritime areas lying off a coastal concavity, be it deep or shallow, an estuary or a gulf." Qatar adds that the technique is simple: "It is sufficient to draw the line perpendicular to the imaginary closing line of the indentation concerned." As for the starting point of the seaward segment of the boundary, Qatar writes that:

"it corresponds to a point situated on the closing line of the concavity, which point may coincide, but does not necessarily do so, with the mid-point of the closing line."⁸⁴⁹

(v) In the present case there is no coastal concavity...

640. In attempting to apply these principles to the northern sector, Qatar's reasoning goes astray in several respects.

641. The situation in the present case is certainly not that of a "coastal concavity", an "estuary", or a "gulf". The waters between Bahrain and Qatar are not a more or less pronounced concavity, they are not a gulf or an estuary, they do not conclude in common terra *firma*. The waters between Bahrain and Qatar are, rather, a channel open on both sides. Of this Qatar is perfectly aware:

"It is quite clear that the territories of Qatar and Bahrain do not meet in the south.... In this respect, they are different from the territories of Argentina and Uruguay which meet at the end of the Rio de la Plata; they are also different from the territories of Canada and the United States which are contiguous at the end of the Gulf of Maine."⁸⁵⁰

⁸⁴⁸ P. Weil, The Law of Maritime Delimitation – Reflections, Cambridge, Grotius (1989), p. 275.

⁸⁴⁹ QM para. 12.57

⁸⁵⁰ QM para. 12.59. See para. 12.58.

It is at this precise point that Qatar's argument breaks down. The situation in the present case, Qatar recognises, is not that of a "pronounced coastal concavity"; it is neither that of the Rio de la Plata, nor that of the Gulf of Maine. It is, so Qatar argues, "related to such a situation",⁸⁵¹ "reminiscent" of such a situation: the word "reminiscent" appears no fewer than five times in a few lines.⁸⁵² Qatar's claim to apply the methodology of the Rio de la Plata – which, be it recalled, is defined by the Treaty itself as that of equidistance and not that of perpendicularity – to "a geographical configuration which, while not in the strict sense of the word a gulf or an estuary, is certainly reminiscent of such a configuration",⁸⁵³ is based upon an indefensible conceptual shift.

(vi) ... and, therefore, no "closing line"

642. Having thus extended a method which, in certain circumstances, is appropriate for a gulf or estuary, to what Qatar recognises to be neither a gulf nor an estuary but merely something "reminiscent" of these, Qatar proceeds to extend the concept of a "closing line", which is valid for gulfs and estuaries, and wrongly applies it to a situation which is neither a gulf nor an estuary. Wherever Qatar's Memorial discusses the separation between the two sectors, it refers simply – and quite correctly – to a "notional line" or an "imaginary line" from Ra's Rakan to Muharraq.⁸⁵⁴ When it comes to the discussion of the delimitation method applicable to maritime areas lying off a coastal concavity, an estuary or a gulf, Qatar's Memorial refers to "the line perpendicular to the imaginary closing line of the indentation concerned."⁸⁵⁵ Contrary to what Qatar would have one believe (see Maps N° 17, 20 and 21 of Qatar's Memorial),

⁸⁵¹ QM para. 12.49.

⁸⁵² QM paras. 12.58-12.59.

⁸⁵³ QM para. 12.58

⁸⁵⁴ QM paras. 11.2 and 12.10. See para. 12.61.

⁸⁵⁵ QM para. 12.57. (Emphasis added.)

however, the line Ra's Rakan/Muharraq is not in any sense a "closing line". This shift in meaning extends and confirms Qatar's original conceptual shift. Qatar would have the Court believe that the present case concerns the delimitation of a gulf, one segment of the maritime boundary being situated in an inner area, within the gulf, the other segment being situated in an outer area, outside the gulf, and the two areas being separated by the closing line of the gulf. This characterisation is pure fantasy, and Qatar's incorrect usage of the term "closing line" – a term of art (see Art. 10(4) of the 1982 Convention) which does not have infinitely elastic meanings – is just as unacceptable as Qatar's incorrect treatment of the maritime boundary delimitation between Bahrain and Qatar as a delimitation of a gulf or estuary.

(vii) The single maritime boundary requested by Qatar to the north of point BLV is a perpendicular only in name

643. The method which Qatar purports to apply in the northern sector is, in fact, not the method of perpendicularity at all, but an arbitrary method which has nothing in common with the perpendicularity method except appearances.

644. The method which Qatar has devised does not start from what Qatar itself calls the starting point of the perpendicular, *i.e.*, the point on the imaginary line Ra's Rakan/Muharraq at which the perpendicular to this line is to be erected. Qatar's method starts from BLV, because Qatar regards it as axiomatic that the single maritime boundary in the northern sector "must necessarily pass through point BLV" – in Qatar's words, a "true reference point or anchor point" and a "turning point" of the greatest importance.⁸⁵⁶ The location of the starting point of Qatar's so-called perpendicular is thus determined by a point which is external to the line Ra's Rakan/Muharraq, and which is, in fact, situated considerably to the north of this line. The point R on Qatar's Map N° 20 has not been selected on its own merits. It is merely the consequence – the

⁸⁵⁶ QM paras. 12.5 and 12.62.

side-effect, one might say – of the choice of the point BLV as the anchor point of the perpendicular. The method followed in the delimitations of the Rio de la Plata and of the Gulf of Maine was completely different: in these two cases, the starting point of the perpendicular on the closing line was selected on its own merits, not on the basis of a point external to the closing line. Point R of Qatar's Map N° 20 is not the starting point on the so-called closing line, it is not "the base of the boundary of the seaward maritime areas" – as Qatar admits it should be. Point R is no more than a result of the arbitrary choice of the point BLV as the anchor point of the perpendicular. The Qatari perpendicular does not start from the so-called closing line. It starts from the point BLV.

645. Contrary to the precedents of the Rio de la Plata and the Gulf of Maine, the so-called perpendicular which Qatar claims does not "follow or continue the line drawn" in the inner area. This is plainly apparent from Map N° 20 in Qatar's Memorial. The boundary which Qatar claims between the so-called closing line and the point BLV is not a perpendicular. The segment R/BLV on Qatar's Map N° 20, and the corrected segment T/BLV on Qatar's Map N° 21, are both shown as dotted lines; neither is the boundary which Qatar claims; they are both phantom perpendiculars. In short, having trumpeted the virtues of the method of drawing a perpendicular to a closing line, Qatar claims a boundary N/NSLB/BLV which bears no relation whatever to a perpendicular.

646. Only to the north of the point BLV is Qatar's perpendicular shown as a solid line. But as this perpendicular is attached to no point on the land, it is not governed by the coastal geography. In the Treaty of the Rio de la Plata and in the Gulf of Maine case the land points at the two extremities of the closing line played a decisive role. Here, by contrast, the so-called perpendicular which Qatar claims is independent of any coastal points. The segment of the boundary claimed by Qatar northwards of the point BLV, so Qatar explains, "corresponds to the perpendicular from BLV" on the so-called closing

line, "it being understood that this perpendicular has been slightly modified so that the end point of the boundary in the northern sector can coincide"⁸⁵⁷ with point 2 of the Bahrain/Iran Agreement, which Qatar then refers to as the Qatar/Iran/Bahrain tripoint. A "modified" perpendicular, however, is simply not a perpendicular. For all its talk of perpendicularity, Qatar's line is determined by the point BLV, a point which bears no relation to geographical reality, whose rationale is unknown, and which Qatar surmises was "probably" chosen for reasons related to navigation. The real and only *raison d'être* of the point BLV is that it is situated on the British 1947 line. Qatar's affirmation that the "geometrical method" of perpendicularity "is based on the coasts of the Parties themselves, and on the northernmost points of their respective territories"⁸⁵⁸ is contradicted by the manner in which Qatar purports to apply this method to the present case. Qatar's insistent reminders of the primacy of geographical reality⁸⁵⁹ are reduced to empty platitudes when Qatar comes to apply the perpendicularity method to the concrete facts of the case.

E. The proportionality test in Qatar's Memorial

647. The *a posteriori* proportionality test, which Qatar has seen fit to append to its claim,⁸⁶⁰ is just as arbitrary. In the light of the findings of the Court in the Jan Mayen case, this type of exercise is today irrelevant. The Court considered that "the disparity between the respective coastal lengths of the relevant area" is a relevant circumstance which must be taken into account; a "significant" disparity, the Court said, "must be taken into consideration during the delimitation operation." The Court, however, added that

⁸⁵⁷ QM para. 12.72.

⁸⁵⁸ QM para. 12.43.

⁸⁵⁹ QM para. 12.26.

⁸⁶⁰ QM para. 12.65.

"It is not a question of determining the equitable nature of a delimitation as a function of the ratio of the lengths of the coasts in comparison with that of the areas generated by the maritime projection of the points of the coasts."⁸⁶¹

648. Bahrain has demonstrated above⁸⁶² that there is no significant disparity between Bahrain's and Qatar's respective coastal lengths. There is therefore no justification for adjusting the equidistance line to be drawn in the southern sector. There is still less justification for such an adjustment in the northern sector, which is removed from any coast, "in the open sea", as Qatar correctly states, and whose only reference points on land are the northernmost points of the two countries (Ra's Rakan and Fasht ad Dibal, according to Bahrain; Ra's Rakan and Muharraq, according to Qatar).

649. The proportionality test, then, has no application in the instant case. As a result, Bahrain sees no reason to engage in a detailed analysis of Qatar's purported application of the proportionality test. Bahrain simply points out the absurdity of Qatar's attempt to compare the ratio of the areas of the respective maritime zones delimited by its proposed boundary in the northern sector with the ratio of the Parties' respective coastal lengths in the southern sector.⁸⁶³ Once again, Bahrain recalls the rejection by the Tribunal in the Anglo-French case of France's proposal for a delimitation of the Atlantic Region along a median line delimited by reference to the prolongation of the general directions of the Channel coasts of the two countries.⁸⁶⁴ There is no possible justification for verifying the equitableness of a proposed delimitation in the northern sector by reference to the ratio of the Parties' respective coastal lengths in the southern sector.

⁸⁶¹ I.C.J. Reports 1993, pp. 67-68, paras. 65-68.

⁸⁶² See *supra*, paras. 614 *et seq.*

⁸⁶³ QM paras. 12.70-12.71.

⁸⁶⁴ See *supra*, paras. 589 and 615.

SECTION 8.4 The single maritime boundary requested by Qatar is not in accordance with the fundamentals of the law of maritime delimitation

A. The single maritime boundary requested by Qatar disregards the very concept of maritime delimitation

650. In its judgment in the Maritime Delimitation in the Area between Greenland and Jan Mayen case, the Court held that:

"... maritime boundary claims have the particular feature that there is an area of overlapping entitlements, in the sense of overlap between the areas which each State would have been able to claim had it not been for the presence of the other State; this was the basis of the principle of non-encroachment enunciated in the North Sea Continental Shelf cases."⁸⁶⁵

There is no place for maritime delimitation unless the entitlements of two States overlap, and delimitation is nothing other than the division of what the Court called in that case "the area of overlapping potential entitlement".⁸⁶⁶ The delimitation process consists of reducing the entitlement of each of the parties by a method which will, by taking account of the relevant circumstances, lead to an equitable result. The reduction must be mutual and must affect the two parties equitably; otherwise, by definition, the process has not led to an equitable result.

651. By looking again at Map N° 14 of Qatar's Memorial, reproduced here as Map 4, one can see that – even assuming (which Bahrain denies) the Hawar Islands and the Zubarah Region to belong to Qatar, and even ignoring (for which Bahrain sees no justification) the other Bahraini maritime features – the boundary requested by Qatar runs partially, if not mostly, within the territorial sea of Bahrain (shown in pink on the map), and not within the area of overlap of the 12-mile projections of the two States.

⁸⁶⁵ I.C.J. Reports 1993, p. 64, para. 59.

⁸⁶⁶ *Op. cit.*, p. 47, para. 19. On this concept, see P. Weil, *op. cit.*, p. 47.

The boundary claimed by Qatar does not divide the "area of overlapping potential entitlement" – which is the essence of maritime delimitation. Even on the assumption that the Hawar Islands and the Zubarah Region belong to Qatar and that the features to the east of Bahrain's main island are to be ignored, for a major part of its extent Qatar's proposed boundary encroaches upon Bahrain's 12-mile entitlement only, while leaving Qatar's 12-mile entitlement intact.

B. The single maritime boundary requested by Qatar disregards the principles and rules governing the delimitation process

652. Qatar rightly emphasises the importance of the principle of the "primacy of the general configuration of the coasts of the States which are parties to a delimitation process."⁸⁶⁷ As the Chamber of the Court stated in the Gulf of Maine case, "[t]he delimitation line to be drawn in a given area will depend upon the coastal configuration."⁸⁶⁸ The boundary which Qatar claims violates this principle in the southern sector by disregarding the true coasts of the insular and archipelagic ensemble which constitutes the State of Bahrain and taking into account exclusively the coastline of the main island of Bahrain, which is merely one of the components of this ensemble. It violates this principle in the northern sector because it systematically disregards the configuration of the Parties' respective coasts and depends exclusively and arbitrarily on the British 1947 line, which is, itself, detached in this sector from any coastal considerations.

653. Qatar correctly emphasises the unity of the rules governing the delimitation process under contemporary international law.⁸⁶⁹ Whether the delimitation concerns the territorial sea, the continental shelf, the exclusive economic zone or a single maritime

⁸⁶⁷ QM para. 12.26.

⁸⁶⁸ I.C.J. Reports 1984, p. 330, para. 205.

⁸⁶⁹ QM paras. 11.37, 11.41, and 12.13-12.16.

boundary; whether the relevant coasts are opposite or adjacent; and whether the applicable law is treaty law which refers to the equidistance-special circumstances rule, or customary law which refers to the equitable principles-relevant circumstances rule, the method to be applied is always the same: namely, a provisional equidistance line which may be adjusted or shifted, if circumstances so require, in order to arrive at an equitable result. Qatar's claim, however, completely fails to comply with this principle. At no point, either in the southern or in the northern sector, does Qatar contemplate the equidistance line as a provisional boundary. In the southern sector and as far north as the point BLV, Qatar takes as its provisional boundary the 1947 line, before deciding to "disregard" this line southwards of point L. In the northern sector, Qatar takes this same 1947 line as its provisional – and final – boundary as far north as the point BLV; northwards of the point BLV, Qatar takes as its provisional boundary a perpendicular passing through the point BLV to a so-called closing line, and then rotates this perpendicular about the point BLV. In the contemporary law of maritime delimitation, the purpose of considering relevant circumstances is to verify whether the provisional equidistance line will lead to an equitable result and, if necessary, to adjust or shift it. Qatar's proposed method is completely different: Qatar takes as its provisional line the British 1947 line as far north as the point BLV, and a line passing through BLV, perpendicular to a so-called closing line. It is this provisional line which Qatar modifies in the light of selected relevant circumstances. The legally required process of delimitation is thereby completely distorted.

C. The single maritime boundary requested by Qatar disregards the fundamental principle that an equitable solution is "the aim of any delimitation process"

654. This principle was reaffirmed on several occasions in the Maritime Delimitation in the Area between Greenland and Jan Mayen case.⁸⁷⁰

655. The single maritime boundary claimed by Qatar disregards a significant proportion of Bahrain's coastline: not only the coasts of the Hawar Islands and of the Zubarah Region, but also the coasts of Fasht ad Dibal, Qit'at Jaradah and all of the other legally relevant features which together make up the State of Bahrain. By no stretch of imagination can such a boundary be regarded as an equitable result as required by international law.

656. To the north of latitude 26° approximately, the single maritime boundary requested by Qatar allocates to Qatar more than its 12-mile territorial sea while leaving to Bahrain less than its 12-mile territorial sea. This is particularly unacceptable to the north of Qit'at Jaradah, where the coasts of Bahrain and Qatar are separated by more than 24 miles and where there can be no justification for a boundary which amputates the territorial sea of one Party while leaving to the other more than the entirety of its territorial sea. By no stretch of imagination can such a boundary be regarded as an equitable result as required by international law.

⁸⁷⁰ I.C.J. Reports 1993, p. 59, para. 48; p. 62, para. 54 ("The aim in each and every situation must be to achieve an equitable result"); p. 69, para. 70 (an equitable result "is the objective of every maritime delimitation based on law").

SUBMISSIONS

In view of the facts and arguments set forth in Bahrain's Memorial and in this Counter-Memorial;

May it please the Court, rejecting all contrary claims and submissions, to adjudge and declare that:

1. Bahrain is sovereign over Zubarah.
2. Bahrain is sovereign over the Hawar Islands, including Janan and Hadd Janan.
3. In view of Bahrain's sovereignty over all the insular and other features, including Fasht ad Dibal and Qit'at Jaradah, comprising the Bahraini archipelago, the maritime boundary between Bahrain and Qatar is as described in Part Two of Bahrain's Memorial and in this Counter-Memorial.

Bahrain reserves the right to supplement or modify the preceding submissions.

(Signed)-----

Jawad Salim Al Arayed

Minister of State and Agent of the State of Bahrain

APPENDICES

1. LIST OF ILLUSTRATIVE MAPS IN THE COUNTER-MEMORIAL
2. LIST OF DOCUMENTARY ANNEXES

APPENDIX 1

LIST OF ILLUSTRATIVE MAPS IN THE COUNTER-MEMORIAL

Map No.	Description
1.	The maritime boundary proposed by Bahrain
2.	The single maritime boundary requested by Qatar
3.	The British 1947 line and the single maritime boundary requested by Qatar
4.	Map N° 14 of Qatar's Memorial
5.	British 1947 line with 3 nautical miles projection from Bahrain main island and from Qatar
6.	Map N° 16 of Qatar's Memorial
7.	Map N° 20 of Qatar's Memorial
8.	Map N° 21 of Qatar's Memorial
9.	The single maritime boundary requested by Qatar (northern sector)
10.	Map N° 18 of Qatar's Memorial
11.	Map N° 19 of Qatar's Memorial

APPENDIX 2

LIST OF DOCUMENTARY ANNEXES

Annex No.	Description	Page No.
1(a)	Al Emir Al Hafiz Ibn Makola, in <u>Al Ikmal</u> Vol. 1, p. 99 (475 H/ 1082 AD)	1
1(b)	Translation of Al Emir Al Hafiz Ibn Makola, in <u>Al Ikmal</u> Vol. 1, p. 99	2
2(a)	Sam'ani, in <u>Al Ansab</u> Folio 180/Manuscript (562 H/ 1166 AD)	3
2(b)	Translation of Sam'ani, in <u>Al Ansab</u> Folio 180/Manuscript	4
3(a)	Yaqut al Hamawi, in <u>M'ojam al Buldan</u> Vol. 1, p. 315 (622 H/ 1228 AD)	5
3(b)	Translation of Yaqut al Hamawi, in <u>M'ojam al Buldan</u> Vol. 1, p. 315	6
4	Report of the British Political Resident to the Political Department of the Government of India, 2 February 1863, Letter No. 38 of 1863 Bombay Archives, Political Department File No. 248	7-9
5	Understanding between representative of the Ruler of Bahrain and representative of the Sheikhs of the Doha confederation, 10 April 1869 (IOR L/P&S/9/15)	10-12
6	Despatch from British Political Resident, 18 November 1869, Supplement to the Gazette of India, 22 January 1870	13
7	Letter from the British Political Resident to the Chief and Members of the Dowasir Tribe at Budaiya and Zellaq, 21 November 1869, Supplement to the Gazette of India, 22 January 1870, pp. 66-67	14-15
8	Report to British Political Resident, dated 1 May 1870, Bombay Archives, Political Department Vol. 105, (1869)	16-17
9	Major S. Smith, Report of the Assistant British Political Resident from Biddah, 20 July 1871 (R/15/2/E/110)	18
10(a)	F. Wüstenfeld, <u>Bahrein und Jemäma</u> , (1874), pp. 6-10	19-24
10(b)	Translation of F. Wüstenfeld, <u>Bahrein und Jemäma</u> , (1874), pp. 6-10	25-29
11	Letter from News Agent, Bahrain, to British Political Resident, 14 October 1874 (R/15/2/E/10)	30-31
12	Report from Officiating 2nd Assistant Resident to British Political Resident, 8 March 1875 (IOR P/775)	32-34

13	Letter from News Agent, Bahrain, 16 March 1875 (IOR P/775)	35
14	Translated purport of a letter from Jasim bin Thani, El-Bida, to British Political Resident, (included in a collection of 1880 correspondence) (IOR P/1741)	36
15	Letter from Sheikh Jasim Al Thani to British Political Resident, 24 November 1880, Bombay Archives, Political Department File No. 1680, Vol. 158 (IOR P/1741)	37-38
16	Report from Lieutenant A. R. Stock to Commander G.W. Hand (H.M.S. Beacon, Senior Officer in Persian Gulf), 4 December 1880 (IOR P/1741)	39-40
17	Note from British Political Resident of secret interview with Nasir bin Mubarrak at Guttur, 1881 (IOR L/P&S/9/66A)	41-43
18	Residency and Muscat Political Agency Reports, 1886-1887, p. 7	44
19	Persian Gulf Administrative Reports, 1886-1887, p. 6	45
20	Bahrain Residency Agent Reports, 29 December 1887 (IOR P/3/276), p. 363	46
21	Despatch from Bahrain Residency Agent, 3 January 1888 (IOR P/3276)	47-48
22	Letter from Ruler of Bahrain to British Political Resident, 4 January 1888 (IOR P/3276)	49
23	Memorandum from India Office to Foreign Office, 2 November 1888, Muscat Archives, 1888 Book, Political Section	50
24(a)	Letter from the Governor of the Sancak of Nejd, 17 October 1891 (Askeri M 1310, nr. 16)	51
24(b)	Translation of Letter from the Governor of the Sancak of Nejd, 17 October 1891	52
25(a)	Ottoman Report on Qatar, 22 September 1893 (YEE K14 E250 Z126 K8)	53-68
25(b)	Translation of Ottoman Report on Qatar, 22 September 1893	69-86
26(a)	Ottoman Report on Bahrain, 16 September 1895 (HR.HMS.ISO 39/2-2)	87-89
26(b)	Translation of Ottoman Report on Bahrain, 16 September 1895	90

27(a)	Ottoman Report concerning Zubarah and Bahrain, 12 February 1896 (HR.HMS.ISO 39/2-2)	91-92
27(b)	Translation of Ottoman Report concerning Zubarah and Bahrain, 12 February 1896	93
28(a)	Report on Bahrein from the Ottoman Council Chamber, 22 April 1900 (HR.HMS.ISO.39/2-2)	94-95
28(b)	Translation of Report on Bahrein from the Ottoman Council Chamber, 22 April 1900	96-97
29	Letter from J.C. Gaskin, Assistant British Political Agent to Lieutenant-Colonel C.A. Kemball, British Political Resident, 22 March 1902 (IOR R/15/2/26)	98-99
30	Letter from J.C. Gaskin, Assistant British Political Agent to Lieutenant-Colonel C.A. Kemball, British Political Resident, 29 March 1902 (IOR R/15/2/26)	100-102
31	Memorandum from Captain Prideaux, British Political Agent to the British Political Resident in the Persian Gulf, 23 December 1905 (IOR R/15/2/26)	103-105
32	Letter from Captain Prideaux to Major Cox, 3 February 1906 (FO 371/344 131010)	106-107
33(a)	Note from Ottoman Minister of the Interior to Council of Ministers/Vizier, 11 December 1908 (BEO No. 259726)	108-109
33(b)	Translation of Note from Ottoman Minister of the Interior to Council of Ministers/Vizier, 11 December 1908	110
34	Administrative Report on the Persian Gulf Political Residency for April to December 1908, Calcutta, Superintendent Government Printing, India, 1909, p. 5	111
35(a)	Report from province of Basra to Ottoman Ministry of the Interior, 25 September 1909 (DH.MUI 34-2/11)	112
35(b)	Translation of Report from province of Basra to Ottoman Ministry of the Interior, 25 September 1909	113
36(a)	Communications between Vali of Basra and Ottoman Minister of the Interior re Zubarah, 30 November 1911 (HR.HMS.ISO 39/2-2)	114-115
36(b)	Translation of Communications between Vali of Basra and Ottoman Minister of the Interior re Zubarah, 30 November 1911	116

37(a)	Note from Hakki Pasha, former Grand Vizier, 25 February 1913 (A.AMD.HV. 103/19 Inner File 59)	117
37(b)	Translation of Note from Hakki Pasha, former Grand Vizier, 25 February 1913	118
38(a)	Document from Ottoman Ambassador to London to Ottoman Council of Ministers, 28 February 1913 (A.DVN Dossier 800 Inner File 49)	119
38(b)	Translation of Document from Ottoman Ambassador to London to Ottoman Council of Ministers, 28 February 1913	120
39(a)	Telegram from acting Vali of Basra to Grand Vizier, 8 March 1913 (A.DVN. Dossier 801 Inner File 47/6)	121
39(b)	Translation of Telegram from acting Vali of Basra to Grand Vizier, 8 March 1913	122
40(a)	Projected Ottoman Council of Ministers decision concerning Qatar re negotiations with Britain, 11 March 1913 (A.AMD.MV 1093/19 Inner File 57-58)	123-124
40(b)	Translation of Projected Ottoman Council of Ministers decision concerning Qatar re negotiations with Britain, 11 March 1913	125
41	Memorandum from British Political Resident to Government of India, 30 June 1913 (FO 371/1828)	126-127
42	Telegram from British Political Resident to Foreign Secretary of India, 31 August 1913 (IOR R/15/5/27)	128
43(a)	Official report of the Ottoman Council of Ministers, 1 February 1914 (MV. 233 p. 50)	129-130
43(b)	Translation of Official report of the Ottoman Council of Ministers, 1 February 1914	131
44	Letter from British Political Resident to Foreign Secretary of India, 15 September 1914 (IOR R/15/5/27)	132-135
45	Lorimer, <u>Gazetteer of the Persian Gulf, Oman and Central Arabia</u> , Vol. I, 1915, pp. 793-794, 798-800, 834 and 848	136-141
46	<u>Gazetteer of Arabia</u> , Vol. 1, 1917, pp. 486-87	142-143
47(a)	Ottoman Report concerning Bahrain, Qatar, Nejd and Basra, 29 May 1917 (HR.HMS.ISO 29/2-1)	144-150

47(b)	Translation of Ottoman Report concerning Bahrain, Qatar, Nejd and Basra, 29 May 1917	151
48	Letter from British Political Resident to Foreign Secretary of India, 13 May 1921 (FO 371/7724)	152-154
49	Note from British Political Agent, to British Political Resident, entitled "Bahrain Affairs," 13 July 1922 (IOR R/15/2/87)	155-158
50	Letter from Lt. Col. A.P. Trevor, British Political Resident to D. de S. Bray, Foreign Secretary to the Government of India, 16 July 1922 (IOR R/15/2/87)	159-161
51	Despatch from Lieutenant-Colonel A.P. Trevor, British Political Resident, to Denys de S. Bray, Foreign Secretary to the Government of India, 10 November 1922 (IOR L/P&S/11/222)	162-166
52(a)	Al-Nabhani, <u>al-Tuhfa al-Nabhaniya fi Ta'rikh al-Jazira al-'Arabiya</u> , (Cairo 1923) (section entitled "The Battle of Umm Suwayya")	167-168
52(b)	Translation of Al-Nabhani, <u>al-Tuhfa al-Nabhaniya fi Ta'rikh al-Jazira al-'Arabiya</u> (Cairo 1923) (section entitled "The Battle of Umm Suwayya")	169
53	Memorandum from British Political Agent to British Political Resident, 31 March 1924 (IOR R/15/2/87)	170-172
54	1924 Bahrain Civil Lists	173-174
55	Letters from W. Hendry to Sheikh Hamad bin Isa Alkhalifa, 15 and 19 September 1925, attaching 1925 Bahrain Civil Lists	175-191
56	Letter from British Political Resident to the Foreign Secretary of India, 7 June 1932 (FO 371/16000)	192-196
57	Letter from BAPCO to British Political Agent, 4 April 1933 (IOR R/15/2/389)	197-199
58	Letter from Major Frank Holmes (BAPCO) to British Political Agent, 17 May 1933 (IOR R/15/1/652)	200-202
59	Letter from British Political Agent to British Political Resident, 29 May 1933 (IOR R/15/1/652)	203-206
60	Letter from Yusuf bin Ahmed Kanoo to British Political Agent, 21 June 1933 (IOR R/15/2/389)	207
61	Letter from British Political Resident to the Secretary of State for the Colonies, 22 June 1933 (IOR R/15/1/652)	208

62	Letter from British Political Resident to British Political Agent, 29 June 1933 (IOR R/15/2/389)	209-210
63	Copy of Letter from Chief Local Representative of BAPCO to British Political Agent, 8 August 1933 (IOR R/15/1/653)	211-212
64	Letter from Charles D. Belgrave, Financial Adviser to the Bahrain Government, to British Political Agent, 16 August 1933 (IOR R/15/2/390)	213-215
65	Letter from C.S. Burnett to T.C. Fowle, British Political Resident, 28 November 1933 (R/15/1/627)	216
66	India Office Memorandum, 11 January 1934 (FO 371/17813)	217-219
67	India Office Memorandum, 21 February 1934 (FO 371/17798)	220-224
68	Letter from Foreign Minister of Saudi Arabia to British Foreign Office, 20 June 1934, in British Memorial for the Buraimi Arbitration, Annex D No. 7	225-227
69	Despatch from A.S. Calvert to Sir S. Hoare, 10 September 1935 (FO 371/18915)	228
70	India Office Paper, "Reconnaissance - Qatar Peninsula", 15 October 1935 (FO 371/18908)	229-231
71	Letter from T.C. Fowle, British Political Resident, to M.J. Clauson, India Office, 4 January 1936 (FO 371/19973)	232
72	Note entitled "Hawar Islands" from the India Office to British Political Resident, undated, with enclosure entitled "Note on 'Hawar' Island" submitted by S.H. Longrigg (PCL), 29 April 1936 (IOR R/15/1/688)	233-235
73	Letter from Captain T. Hickinbotham, British Political Agent (officiating), to British Political Resident, 9 May 1936 (IOR R/15/1/688)	236-237
74	Telegram from British Political Agent to British Political Resident, 20 June 1936 (FO 371/19973)	238
75	Foreign Office Minute, 26 June 1936 (FO 371/19973)	239
76	Letter from F.C. Starling, Petroleum Department to M.J. Clauson, India Office, 3 July 1936 (IOR R/15/2/400)	240-242
77	Minutes of a meeting held at the India Office, 9 July 1936 (IOR 371/19973)	243-245

78	Letter from C. Dalrymple Belgrave to Hood, 18 July 1936 (FO 371/19973)	246-247
79	Letter from M.J. Clauson, India Office, to S.H. Longrigg, PCL, 14 September 1936 (FO 371/19974)	248
80	Telegram from Sir Trenchard Fowle, British Political Resident, to Secretary of State for India, 12 February 1937 (IOR R/15/1/689)	249-250
81	Copy of letter No. P.A./171 from E.A. Skinner, BAPCO, to British Political Agent, 13 April 1937 (I.O.R. R/15/1/689)	251-258a
82	Telegram from British Political Resident to Secretary of State for India, 28 April 1937 (FO 371/20783)	259-259b
83	Note by A.C.B. Symon, 4 April 1938 (IOR R/15/1/689)	260-261
84	Note by J.P. Gibson, India Office, 7 April 1938 (IOR R/15/1/690)	262-263
85	Letter from R. Peel, India Office to S.H. Longrigg, PCL, 29 April 1938 (I.O.R. R/15/2/437)	264-266
86	Letter from H. Weightman, British Political Agent, to Secretary of State for India, 22 May 1938 (I.O.R. R/15/1/690)	267-268b
87	Letter from Charles Belgrave, Adviser to the Government of Bahrain, to Hugh Weightman, British Political Agent, 23 May 1938, India Office Records (IOR R/15/2/547)	269
88	Extract from British Political Agent's Note, 30 May 1938 (IOR R/15/2/547)	270-271
89	Letter from Adviser to Government of Bahrain to British Political Agent, 6 June 1938 (Bahrain Government Archives)	271a-271d
90	Letter from British Political Agent to British Political Resident, 10 June 1938 (IOR L/P&S/12/3854)	272-274
91	Draft India Office Paper prepared by R. Peel, 8 November 1938 (IOR L/P&S/12/3854)	275-278
92	Telegram from Secretary of State for India to British Political Resident, 16 December 1938 (IOR R/15/1/691)	279-281
93	Decypher of telegram from British Political Agent to Political Department, India Office, dated 8 January 1939 (IOR L/P&S/12/3854)	282
94	Telegram from British Political Resident to Secretary of State for India, London, 9 January 1939 (IOR R/15/1/691)	283

95	Decypher of telegram to British Political Resident from the British Political Agent, 11 January 1939 (IOR L/P&S/12/3854)	284
96	Telegram from Secretary of State for India to British Political Resident, 14 January 1939 (IOR R/15/1/691)	285
97	Letter from Sheikh Hamad bin Isa Alkhalifah to British Political Agent, 6 February 1939 (L/P&S/12/3854)	287-294
98-99	Express Letter from British Political Agent to British Political Resident, 12 February 1939 (IOR R/15/1/691)	295-302
100	Letter from Military Branch, Admiralty, to R.T. Peel, India Office, 31 March 1939 (IOR L/P&S/12/3854)	303-305
101	Letter from S.F.Stewart to Lord Cadman (PCL), 14 April 1939 (IOR L/P&S/12/3854)	306-308
102	Entries from the diary of Sir Charles Dalrymple Belgrave, Tuesday 18 April, Thursday 20 April and Saturday 22 April 1939	309
103	Letter from E. Packet (PCL) to H. Weightman, British Political Agent, 2 December 1939 (I.O.R. R/15/2/547)	310
104	Draft Concession Agreement entitled "1939; The Leased Area; Hawar Islands; Bahrain", (I.O.R. R/15/692)	311-327
105	Express Letter from British Political Agent to British Political Resident, 13 June 1940 (IOR R/15/1/693)	328-329
106	Letter from R. Peel, India Office, to Lt. Col. G.C. Prior, British Political Resident, 16 January 1941 (IOR R/15/1/693)	330
107	Letter from O.K. Caroe to R. Peel, Government of India, 19 November 1941, containing a handwritten annotation by R. Peel (IOR L/P&S/12/3895)	331-332
108	Express letter from W.R. Hay, British Political Resident, 4 June 1946 (FO 371/52254)	333-334
109	Letter from F.A.K. Harrison, India Office, to G.C.B. Dodds, Admiralty, 13 February 1947 (F.O. 371/61441)	335-339
110-112	The LeQuesne Report on the Boundary between Saudi Arabia and Shaikhdoms of Qatar and Abu Dhabi and the Sultanate of Muscat and Oman, (1953), pp. 85-96	340-352
113(a)	Lam'al Shehab, Fi Sirat Muhammad b. 'Abd Al-Wahhab' (edited by A.M. Abu Hakima), (1967), p. 78	353-354

113(b)	Translation of Lam'al Shehab, <i>Fi Sirat Muhammad b. 'Abd Al-Wahhab'</i> (Edited by A.M. Abu Hakima), (1967), p. 78	355-356
114	J.B. Kelly, <u><i>Britain and the Persian Gulf</i></u> , (1968) pp. 162-163, 360-363	357-363
115-116	G. Bibby, <u><i>Looking for Dilmun</i></u> , (1970), pp. 122-123	364-366
117	J.B. Kelly, <u><i>Arabia, the Gulf and the West</i></u> , (1980) pp. 191-192	367-370
118(a)	Bahrain Historical Document Centre, <u><i>Al-Watheeka</i></u> Vol. 4 (1984)	371-372
118(b)	Translation of Bahrain Historical Document Centre, <u><i>Al-Watheeka</i></u> Vol. 4 (1984)	373-377
119	A. Montigny-Kozłowska, <u><i>Evolution d'un groupe bédouin dans un pays producteur de pétrole: les Al Naim de Qatar</i></u> , (1985 Ph.D. thesis), at pp. 66-67 and 136-137	378-382
120	A. Montigny-Kozłowska, "Le partage des biens d'un ancien dirigeant de Qatar" published in Gast, M, ed. <u><i>Hériter en Pays Musulman</i></u> pp. 43-54 (1987)	383-396
121	J.C. Wilkinson, <u><i>Arabia's Frontiers: The Story of Britain's Drawing in the Desert</i></u> , pp. 90, 99, 103-109, 138, 154, (1991)	397-409
122	Note of 12 March 1934 meeting between British Political Resident and Ruler of Qatar. <i>Records of Qatar, 1820-1960</i> , (1991), Vol. V, p. 419-423	410-414

CERTIFICATION

I, the undersigned, Jawad Salim Al Arayed, Agent of the State of Bahrain, hereby certify that the copies of the documents attached as documentary Annexes of the Counter-Memorial submitted by the State of Bahrain in Volume 2 are accurate copies of the documents they purport to reproduce and that where a translation of such a document is attached that translation is an accurate translation of the document.

This day of December 1997

Jawad Salim Al Arayed
Minister of State and Agent of the State of Bahrain